IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

EATON CORPORTATION, et al. — **PLAINTIFFS/COUNTER-DEFENDANTS**

v. — **CIVIL ACTION NO. 251-04-642**

JEFFREY D. FRISBY, et al. — **DEFENDANTS/COUNTER-PLAINTIFFS**

OPINION AND ORDER REGARDING THIS COURT'S *IN CAMERA* REVIEW AND THE SPECIAL MASTER'S JUNE 4, 2012 REPORT AND RECOMMENDATION

On April 17, 2012, this Court was provided with four pages of documents which the Plaintiffs/Counter-Defendants, Eaton Corporation, et al. (hereinafter "Eaton"), should have produced years earlier. On April 18, 2012, this Court ordered Eaton to produce these documents to the Defendants/Counter-Plaintiffs, Jeffrey D. Frisby and the individual engineers, et al. (hereinafter "Frisby"), and Eaton complied. The Court then entered an Order on May 10, 2012, requiring certain Eaton representatives to provide an explanation for the egregious discovery violation. The Court also required Eaton to produce, for *in camera* review, any additional documents that could be responsive to the inquiry into allegations of improper *ex parte* contact between then-Judge Bobby DeLaughter and an attorney for Eaton, Ed Peters. Finally, the Court ordered Special Master Dogan to complete the initial crime-fraud analysis and provide a Report and Recommendation regarding the same.

BEFORE THE COURT is the June 4, 2012 Report and Recommendation of Special Master Dogan, which involves the *in camera* review of approximately 15,299 documents. The documents at issue belong to Eaton and its counsel, and were reviewed *in camera* due to Eaton's claim of attorney-client and/or work product privileges. Based upon this Court's review of the documents, and in consideration of the June 4, 2012 Report and Recommendation, the

Objections thereto by the parties, and after hearing argument on June 29, 2012 the Court finds the following:

PROCEDURAL HISTORY

For more than two years (2008-2010), this Court expended much effort in its attempt to finally resolve an issue that arose in the midst of litigating the case *sub judice*: the extent of the improper contacts between Judge Bobby DeLaughter (hereinafter "Judge DeLaughter" or "DeLaughter") and Ed Peters (hereinafter "Peters"), and Eaton's (and Eaton's counsels') knowledge of the same. On December 22, 2010, this Court issued its ruling granting Frisby's *Motion to Dismiss*, as a sanction for the improper *ex parte* contacts, thereby presuming that the Peters/Judge DeLaughter issue had been finally resolved at the trial court level, at least as far as an *in camera* document review was concerned. Instead, due to Eaton's repeated discovery failures, the Court is again involved in an extensive *in camera* determination, this one much more massive than the first.

The issue is much akin to discovering that an incarcerated man, in prison for life, is also responsible for additional crimes. The perpetrator is already incarcerated, so what should his punishment be, if any? Should his television privileges be taken away? Should he receive less canteen money? Or, should it simply be accepted that the man's initial life sentence for a separate crime is punishment enough? Similarly, Eaton has already been subjected to the ultimate penalty for what this Court found to be the ultimate misconduct: dismissal of its Complaint due to its "fraud on the Court." As explained herein, the documents at issue in this Order evidence further fraud on the Court by Eaton and its counsel. The question remains- What now?

Eaton is exercising its appellate rights concerning the Court's December 22, 2010 findings, but instead of moving on to new issues in this case, the Court and the parties are essentially back at the beginning of this long saga.

How We Got Here

Previously, on June 19, 2009, this Court made extensive findings regarding the applicability of the crime-fraud exception of M.R.E. 502(d)(1) to specific Eaton documents, which were produced in response to discovery requests propounded by the Frisby Defendants (hereinafter "*In Camera* Phase 1"). The discovery requests were a result of raised suspicions through motions with this Court that Peters, counsel for Eaton, was having improper contacts with the former trial judge on this case, Judge DeLaughter. On July 31, 2008, Eaton answered the "Frisby Defendants' First Set of Interrogatories to All Plaintiffs Relating to Inquiry Concerning Any Attempt to Influence a Judicial Officer." Eaton provided a redacted version of its discovery responses to Frisby, and Eaton provided an unredacted version of its discovery responses to Frisby on September 29, 2009. *See Order*, September 29, 2009, PLDG. 989.[1] After Eaton filed its responses, the Court reviewed certain Eaton privileged documents *in camera*, and ruled that approximately eighteen (18) documents, or portions of documents, were discoverable, pursuant to the applicability of the "crime-fraud exception" found in M.R.E. 502(d)(1). Under Mississippi law, a court reviewing privileged documents must use an "item by item approach," to determine whether the crime-fraud exception of Rule 502(d)(1) M.R.E. applies. *See* ***Hewes v.***

[1] The September 29, 2009 Order actually permitted two discovery responses to remain redacted and ordered Eaton to provide unredacted responses for the remaining Interrogatories.

Langston, 853 So.2d 1237, 1246 (Miss. 2003). In its June 19, 2009 Opinion regarding the initial crime-fraud analysis in this case, this Court stated the following:

> This Court, in its Order dated July 14, 2008, responding to the June 8, 2008 Report & Recommendation of the Special Master, found that the party seeking disclosure of the documents (Frisby) did show "a factual basis adequate to support a good faith belief by a reasonable person," that *in camera* review would show the applicability of the [crime-fraud] exception. ***Hewes v. Langston***, 853 So.2d 1237, 1246 (Miss. 2003) (citing ***U.S. v. Zolin.***, 491 U.S. 554, 572 (1989)). Accordingly, the Defendants' *prima facie* assertion that the "crime-fraud exception" applies was correct, and the Court ordered the Special Master to conduct an *in camera* review of the documents. Therefore, the first facet of the *prima facie* requirements, set forth in ***Hewes***, has been satisfied. Pursuant to an *in camera* review, the Special Master recommended to the Court, in his Report and Recommendation dated November 4, 2008, that several documents, or portions of documents, be produced. Later, the Special Master submitted additional recommendations in his Supplemental Report & Recommendation dated February 9, 2009, based on an *in camera* hearing and further study of the documents.
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> Upon a determination that the first facet of the required inquiry into an alleged violation of the "crime-fraud exception" had been satisfied, *prima facie* evidence having been found, the Court has considered the next requirement, as directed by ***Hewes***. Accordingly, the Court hereinafter makes a further factual finding that the more substantial evidentiary burden has been met, as required in ***Hewes***, and that evidence exists that a fraud on the court and the judicial system actually was perpetrated. Documents evidence Peters' involvement, on behalf of Eaton, and that Eaton knew or reasonably should have known such to be a fraud. Further, documents show that Peters was being secretly retained by Eaton, and that his involvement and improper activities would be concealed from Frisby, thereby significantly disadvantaging Frisby in its defense. The following circumstances specifically trigger the application of Rule 502(d)(1) M.R.E., thereby satisfying the second, and final, facet required in ***Hewes***: 1) The documents reflect that Eaton sought Peters' services to benefit Eaton, without the knowledge of Frisby, through Peters' *ex parte* contacts with his close friend, the Judge; 2) Additionally, the documents show that Eaton knew or reasonably should have known that Peters' *ex parte* contacts and improper actions in this case constituted fraud on the court and the judicial system.

Opinion and Order, June 19, 2009, pg. 3-4, PLDG. 909. After Eaton produced the documents, subsequent to its failed attempt at interlocutory intervention at the Mississippi Supreme Court, more issues arose.

This Court permitted Frisby to take certain depositions of witnesses about documents relevant to the "inquiry" evidencing "fraud on the court." A few depositions took place in the early months of 2009, and during that time former Judge DeLaughter entered a guilty plea in the Northern District of Mississippi United States District Court related to his actions in another case. [2] After those developments, the Court granted Frisby permission to propound limited additional discovery.[3] In Eaton's second set of discovery responses, it identified "Q & B 30"[4] as a document at issue. The Court reviewed the document *in camera* and ordered it to be produced immediately. *See Order*, October 13, 2009, PLDG. 1002.

The bulk of the Peters inquiry depositions took place in October, 2009. Depositions were ongoing at the time that Q & B 30 was identified by Eaton counsel at the Wisconsin firm of Quarles and Brady, LLC.[5] As a result of Q & B 30's relevance to the Peters inquiry (and the belated production of the same) the Court entered an *Order*, which required Eaton to certify in response that "all documents that could possibly relate to any alleged ex parte contact between Peters and Judge DeLaughter, as well as any documents related to any previous Order of this Court have been produced, either for *in camera* review or otherwise." *See Order*, October 13, 2009, PLDG. 1003. Eaton so certified in *Eaton's Response to Court's Order Concerning Certification of Production*, October 15, 2009, PLDG. 1006. Less than one month after Eaton's certification of compliance and after all but one of the depositions of Eaton witnesses were

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[2] Judge DeLaughter was dishonest with FBI officers about his *ex parte* contacts with Peters in another case. DeLaughter pled guilty to a crime arising from his dishonesty. He was then disbarred from the practice of law.

[3] On August 17, 2009, Special Master Dogan issued a Report and Recommendation, wherein he recommended that Eaton be required to answer four (4) specific additional Interrogatories propounded by Frisby. No party filed any objection to the Report and Recommendation, and Eaton filed its *Response to Frisby Aerospace's Second Set of Discovery Requests to All Plaintiffs Relating to Inquiry into Possible Ex Parte Contacts* on October 12, 2012.

[4] This document, identified by its Bates stamp number, evidenced Eaton's intent to hide Peters' involvement.

[5] The Quarles and Brady firm has moved to withdraw as counsel for Eaton in the subject litigation.

completed, Eaton's Vice-President and Senior Counsel-Litigation, Vic Leo, filed an affidavit with the Court, "correcting" his earlier affidavit, and identifying an archived e-mail folder on Leo's computer that was not searched for discoverable documents. *See Affidavit of Victor J. Leo Concerning Eaton's E-mail Production*, November 9, 2009, PLDG. 1055. At that time, Eaton's admitted omission went unpunished. After Frisby concluded its discovery regarding the "inquiry" into the alleged improper contacts between Peters and Judge DeLaughter, Frisby renewed its Motion to Dismiss, requesting the dismissal of Eaton's Complaint, due to the "fraud perpetrated on the court." On December 22, 2010, this Court entered its Opinion and Order Dismissing Eaton's Complaint. *See Rulings of the Court Relating to the Defendants' Motion to Dismiss...*, December 22, 2010, PLDG. 1314. The same was certified as a Final Judgment, pursuant to M.R.C.P. 54(b), and is currently on appeal before the Mississippi Supreme Court, as case number 2011-CA-19. In the December 22, 2010 Opinion and Order, the Court declined to strike Eaton's defenses to Frisby's Counterclaims, thus those claims remained when the undersigned took the bench in January 2011.

From the time the undersigned began presiding over this matter (January 2011) until April 2012, the issues before the Court primarily concerned Frisby's counterclaims and matters related thereto. In addition, the undersigned resolved certain issues related to the sealing and unsealing of many documents in the court file. On April 18, 2012, this Court was scheduled to hear argument on the parties' objections to the December 13, 2011 Report and Recommendation concerning Eaton's *Motion for Partial Summary Judgment* regarding Frisby's Counterclaims. On April 17, 2012, Eaton moved to continue the hearing scheduled for the next day, filing a Motion for Continuance and accompanying exhibits. In the Motion for Continuance, Eaton advised that certain documents related to the Peters inquiry were discovered which should have

been produced for this Court's review in 2008 or 2009. Eaton produced four (4) pages of documents to the Court for *in camera* review along with its Motion for Continuance. The Court promptly advised the parties that the Motion for Continuance would be taken up the next day during the scheduled hearing time.

At the April 18, 2012 hearing, Eaton, without waiving its privilege, conceded that the "newly discovered" documents did directly relate to documents that this Court had previously ordered to be produced as evidence of furtherance of "fraud on the Court." *See April 18, 2012 Hearing Transcript*, pg. 5, 6 (Mr. Corlew for Eaton: "We feel those documents are very much like issues that you've already considered. We don't desire to argue the status of those documents.") (Court: "[P]roduction of these [documents] is consistent with prior rulings of the Court?" Mr. Corlew for Eaton: "Yes."). The new documents included communications from Peters about conversations and/or communications with Judge DeLaughter. Accordingly, this Court ordered Eaton to produce the four (4) pages of documents to Frisby, and Eaton immediately complied. Upon viewing the documents, Frisby joined in Eaton's Motion for Continuance of the originally scheduled hearing to provide an opportunity to consider the impact of the new documents on the issues before the Court.

On April 27, 2012, nine (9) days after receiving the newly produced Peters documents, the Frisby Defendants/Counter-Plaintiffs filed a *Motion to Conduct Limited Discovery as to Ex Parte Communications with Judge DeLaughter in Light of Belated Production of Documents and Request for Expedited Consideration*. By an Order entered that same day, this Court required expedited briefing regarding the motion, and the same was fully briefed on May 4, 2012. Unsurprisingly, the Frisby Counter-Plaintiffs and the Eaton Counter-Defendants proposed very different avenues for seeking and providing, respectively, further information about the belatedly

produced documents. On May 10, 2012, this Court entered its *Order Requiring Expedited In Camera Production and Expedited Sworn Affidavits by the Eaton Counter-Defendants*, wherein the Court ordered the following:

1) Eaton shall, within seven (7) days of this Order produce to the Court and to the Special Master, *in camera*, each and every document that is responsive to any previous discovery request or court proceeding, related to the Peters/DeLaughter inquiry, that has not been produced (either at all or in its entirety) for *in camera* inspection previously. If the document mentions or refers (in any manner) to communications with either Judge DeLaughter or Ed Peters, or both, regardless of content, it must be produced. Any document memorializing any communication with, by or from Ed Peters must be produced. Any document that follows after a reference of any communication with, by or from Peters or DeLaughter that contains any recognition of the same must also be produced.[6] [footnote included in original order] This production shall further include any document in the possession of any Eaton outside counsel. The documents produced shall be accompanied with a sworn affidavit from Alexander M. Cutler, Eaton's Chairman and Chief Executive Officer, personally certifying that any and all responsive documents have been produced and acknowledging that additional instances of non-production will result in very serious, *sua sponte*, sanctions. **The documents required shall not include any document that is "of record" as being received by the Frisby Defendants.**[7] [footnote included in original order]

2) Also within seven (7) days, the following Eaton employees or outside counsel shall provide sworn affidavits to the Court, the Frisby Defendants and the Special Master: Alexander Cutler, Vic Leo, Sharon O'Flaherty, Mark McGuire, Taras Szmagala, and Michael Schaalman.[8] [footnote included in original order] Each affiant shall provide full and detailed explanations as to: the withholding of the newly discovered documents, the withholding of any other responsive documents as required in number one above, the reasons for the withholding, the

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[6] A clear example of such recognition can be found in the October 16, 2007 Eaton e-mail chain, and the herein required production shall also include the October 16, 2007 e-mail at 10:56 from Vic Leo to Taras Szmagala (Cc: Sharon O'Flaherty), which was omitted from the documents recently produced or previously produced to the Court. This document shall be produced.

[7] The Eaton Counter-Defendants shall not take this instruction as an invitation to "flood the Court" with paper, because as the parties know, this discovery failure relates to issues, both adjudicated and currently pending, that have required an extraordinary amount of this Court's time. Eaton's document review should be very specific and should include only documents as specifically outlined above. On the morning of deadline stated herein, counsel for Eaton shall e-mail tbis Court with the approximate number of pages to be produced. The Court will respond with the procedure for delivery and whether additional copies of the documents will be necessary.

[8] If any of these persons are no longer employed by Eaton, a detailed affidavit of the circumstances leading to unemployment shall be completed by Alexander Cutler, as well as a current known address of any such person.

responsibility for the withholding, exactly how the documents were discovered and exactly why the documents were not previously discovered. Each affidavit from any above-listed employee who is a licensed attorney shall also contain each affiant's proposed sanction for Eaton's most recent failure to comply with the Court's previous discovery orders, pursuant to M.R.C.P. 37(b) and the Mississippi Litigation Accountability Act, Miss. Code Ann. §11-55-1 (et.seq.).[9] [footnote included in original order] Each sanction proposal should address its effectiveness to deter similar conduct by Eaton, especially in view of the previous sanctions already issued in this matter.[10] [footnote included in original order] Mr. Cutler, upon being advised of the possible sanctions available for the subject violations by his corporate legal representatives, shall also include his proposal regarding appropriate sanctions, under the circumstances. Should any affiant not provide full and detailed explanations of Eaton's clear discovery violations, severe additional sanctions will result.

3) The Court (and the Special Master, if necessary)[11] [footnote included in original order] will consider and rule on the applicability of the "crime-fraud" exception regarding any documents produced, as required and as expediently as possible, and in consideration of this Court's previous rulings regarding similar documents, as acknowledged by Eaton. The Court will set forth the procedure going forward at that time.

Order Requiring Expedited Production, May 10, 2012, pgs. 5-7.

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[9] The Court acknowledges the Frisby Defendants/Counter-Plaintiffs' stated intentions to file additional motions, including a Motion for Sanctions, and the Court will consider the same, if filed. *See Frisby's May 4, 2012 Reply*, pg. 3-4. However, the Court is considering sanctions, on its own motion, as the present circumstances warrant the Court to "make such orders in regard to the failure as are just." M.R.C.P. 37(b)(2); *See also* M.R.C.P. 11(b); U.C.C.C.R. 1.03; *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331, 1335 (Miss. 1989) (holding "Our trial courts have authority to act sua sponte under Rule 11 and ought exercise that authority against the backdrop of their inherent authority to impose sanctions upon those who abuse the judicial process.").

[10] All of the following factors should be considered in each affiants' proposal, as set forth in *Pierce v. Heritage Props., Inc.*, 688 So.2d 1385, 1389 (Miss.1997), and reaffirmed in *Scoggins v. Ellzey Beverages, Inc.*, 743 So.2d 990 (Miss.1999), and most recently in the not yet published decision of *City of Jackson v. Rhaly*, 2009-CT-00350-SCT, 2012 WL 1432549 (Miss. 2012):

(1) Whether the discovery violations were the result of willfulness or bad faith;
(2) Whether the deterrent value of Rule 37 may be achieved by lesser sanctions;
(3) Whether the wronged party has suffered prejudice as a result of the discovery violation; and
(4) Whether the discovery abuse is attributable solely to trial counsel instead of a blameless client.

[11] The Court will determine whether any referral to the Special Master is necessary, pursuant to M.R.C.P. 53(c) and pursuant to April 15, 2008 *Order Appointing Special Master*. If a referral is made, the Court will enter a subsequent Order detailing the parameters and the necessity of the same.

Phase II *In Camera* Document Production

Pursuant to this Court's Order, on May 17, 2012, Eaton produced sworn affidavits from Alexander Cutler, Vic Leo, Sharon O'Flaherty, Mark McGuire, Taras Szmagala, and Michael Schaalman.[12] In addition, Eaton produced 8,264 documents for *in camera* review, Bates Stamp Numbers: WC[13]-Phelps 1-2196; WC-Eaton 1-594; WC-Peters 1-153; WC-Allred 1-28; WC-Butler 1-64; WC-Q&B[14] 1-5223; WC-Eaton 595-600 were inadvertently omitted from Eaton's production on May 17, 2012 and were instead produced on May 22, 2012. The 8,264 documents were not produced in any semblance of organized order, and despite the Court's admonishment, there were a large number of duplicate documents throughout. On May 18, 2012, the Court entered its *Order of Reference*, pursuant to M.R.C.P. 53(c), referring this matter to Special Master David Dogan for a Report and Recommendation.

In view of the content of WC-Eaton 595,[15] (which was received on May 22, 2012), on May 23, 2012, the Court advised the parties, by email, that it was requesting additional *in camera* submissions. Pursuant to the Court's May 23, 2012 e-mail containing its request, on May 30, 2012, Eaton, submitted documents containing handwritten notes of Sharon O'Flaherty and Vic Leo, dated pre-2008, which included Bates Stamp Numbers: WC-Eaton 601-911 (Author Index provided on May 31, 2012). That same day, May 30, 2012, Eaton also submitted handwritten notes of Sharon O'Flaherty and Vic Leo, dated post-2008, along with its *Objection*

[12] For the first time, the Court was informed in the affidavits that Leo and O'Flaherty's employment with Eaton had been terminated.

[13] "WC" is an abbreviation for the Wise Carter law firm.

[14] "Q&B" is an abbreviation for the Quarles and Brady law firm.

[15] WC-Eaton 595 is a page of handwritten notes written by Sharon O'Flaherty regarding a January 15, 2008 "T.C" or telephone conference with Michael Schaalman. O'Flaherty wrote "MS seems so corrupt- Do we need to add someone to team who knows Yerger?" and "Ed P. said DeLaughter's opinions may not be respected by Yerger." Eaton has repeatedly denied having any contact with Ed Peters after December 20, 2007, which is completely contradicted by this document. Also significant is O'Flaherty's note referencing Eaton's ongoing practice of trying to improperly influence the court.

to Review of Certain Documents. After permitting a response from Frisby and a reply from Eaton, the Court entered its June 18, 2012 Order overruling Eaton's objection regarding the following documents: Bates Stamp Numbers: WC-Eaton 912-1525 (Author Index provided on June 1, 2012); WC-Eaton 1526-1576 (identified by Eaton as undated documents that are possibly responsive to Court's May 10, 2012 Order but are undated; WC-Eaton 1577-1579 (identified by Eaton as documents that are possibly responsive to Court's May 10, 2012 Order but just discovered).

On May 29, 2012, Special Master Dogan sent an e-mail to the parties requesting certain invoices to be submitted pursuant Eaton's May 17, 2012 transmittal letter. On May 31, 2012 Eaton submitted Bates Stamp Numbers: WC-Eaton 1580-1585 (Allred Invoices); WC-Phelps 2197-2235 (Phelps Dunbar Invoices); WC-Butler 2629-2632 (Butler Snow Invoices); WC-Q & B 5224-5313 (Quarles & Brady Invoices). Upon the Court's initial review of the May 29, 2012 submissions, the Court entered its June 8, 2012 *Order Requiring Additional In Camera Production*. Accordingly, on June 12, 2012 and June 19, 2012, Eaton submitted additional timesheets and invoices, as ordered, namely Bates Stamp Numbers: WC-Phelps 2236-2265; WC-Phelps 2266-2281; WC Q & B 5314-5426; WC-Q & B 5427-5430; WC-Phelps 2282-2417; WC-Phelps 2418-2422- identified by Eaton as possibly responsive to Frisby's 2009 discovery requests but not previously produced.

On June 26, 2012, Eaton produced certain belatedly discovered Phelps Dunbar documents, namely Bates Stamp Numbers: WC-Phelps 2423-4522. Finally, Eaton's entire Peters file was made available via Eaton's May 17, 2012 letter to the Court. The Peters documents were produced to Special Master Dogan on May 21, 2012 and produced to the Court on July 17, 2012, namely Bates Stamp Numbers: WC-Peters 1-3666

The total number of pages of documents reviewed item-by-item *in camera* by this Court is approximately **15,299**.[16]

APPLICABLE LAW

In 2008, Eaton filed a brief entitled *Plaintiffs' Brief Concerning the Court's Duties Under Mississippi Law Re: In Camera Review of Documents. Eaton Brief*, May 29, 2008, PLDG. 574. Therein, Eaton correctly emphasizes the importance of *Hewes v. Langston* as Mississippi's central case authority regarding a trial court's *in camera* review. *Hewes v. Langston*, 853 So.2d 1237, 1246 (Miss. 2003). The Court intends to include its comprehensive "document by document" findings herein, pursuant to *Hewes*. First, the Court will address its jurisdiction over this matter.

I. Circuit Court's Jurisdiction

At this Court's most recent hearing in the case *sub judice*, Eaton renewed its general jurisdictional objections. Accordingly, the Court will address this issue briefly. As previously referenced herein, the December 22, 2010 Opinion and Order of this Court dismissing Eaton's Complaint is currently pending on appeal before the Mississippi Supreme Court. The dismissal was certified as a Final Judgment pursuant to M.R.C.P. 54(b). See *Eaton v. Frisby*, Cause No. 2011-CA-19. Recently and as a result of the newly produced documents, Frisby filed a *Motion to Stay Appeal Pending Other Proceedings and Additional Findings in the Trial Court*, which was denied by the Mississippi Supreme Court on June 27, 2012. In response to the Supreme Court's ruling, counsel for Eaton stated there are "jurisdictional problems" that were first raised by Eaton "a year and a half ago" because Frisby is "asking this Court to relitigate matters that have already been litigated." *June 29, 2012 Hearing Transcript*, pg. 57. This argument by

[16] Special Master Dogan also reviewed certain Butler Snow documents, due to an inconsistency that was since clarified by John Sneed, counsel for Eaton in his May 30, 2012 e-mail to the parties and the Court. Accordingly, the clarification negated the necessity for the Court to include those documents in its review.

Eaton's counsel is in apparent reference to Eaton's January 20, 2011 *Motion to Vacate or, Alternatively, to Modify December 29, 2010 Order Regarding Sealed Documents*. In that motion, Eaton contended that Judge Yerger's December 29, 2010 Order unsealing certain documents in the subject case was improper, because "the Court lacked jurisdiction to enter the order following the filing of the notice of appeal." *Id.* at 1.

A. Practical Considerations

It is undisputed that Mississippi Rules of Civil Procedure emphasize a duty on all parties to supplement discovery responses. M.R.C.P. 26(f)(2);(3); *See also Knapp v. St. Dominic-Jackson Meml. Hosp.*, 89 So.3d 561, 566 (Miss. 2012) (holding "Rule 26(f)(2) requires a party 'seasonably to amend' previous discovery responses if that party 'obtains information upon the basis of which (a) the party knows that the response was incorrect when made, or (b) knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.' This rule still is applicable even after a discovery deadline has passed." (internal citations omitted)).

Certainly the Court agrees that the discovery in the original Peters inquiry was propounded by Frisby and answered by Eaton in 2008 and 2009, prior to this Court's dismissal of Eaton's Complaint and prior to Eaton's filing of its Notice of Appeal. However, to refuse jurisdiction, under the circumstances, would give Eaton (and similarly situated parties) undue rewards for failing to comply with the discovery rules. As the Court will explain further herein, Eaton failed to turn over many documents related to its relationship with Peters and Peters' contacts with then-Judge DeLaughter, despite the duty to amend or supplement imposed by M.R.C.P. 26(f) and by this Court's October 13, 2009 Order, which required "Eaton to file a brief

response to this Order advising that all documents that could possibly relate to any alleged ex parte contact between Peters and Judge DeLaughter, as well as any documents related to any previous Order of the Court have been produced, either for *in camera* review or otherwise." *See Order*, October 13, 2009, PLDG. 1003. An overwhelming majority of the documents discussed herein are documents that were clearly subject to one or more discovery requests made by Frisby. The trial court, in an attempt to accommodate Eaton's desire to appeal its ruling, certified its dismissal as a Final Judgment, pursuant to M.R.C.P. 54(b). The trial court did not so certify to provide Eaton with an ability to hide documents and then emerge as a "good guy" by turning over "newly discovered" documents at a time when it faced no consequences for its extremely significant discovery failures. The Court would not have granted a Rule 54(b) Final Judgment had the Court been aware of Eaton's continual discovery failures.

In the May, 2012 affidavits of various Eaton employees, Eaton contends that an outside law firm, Latham & Watkins LLP, was hired in 2011 to review certain documents, and Eaton's discovery omissions were discovered as a result. Instead, the documents reviewed herein reflect that Latham & Watkins was in fact hired by Eaton in 2008, and it remains ambiguous exactly when the documents disclosed by Eaton on April 17, 2012 were discovered. At the very least, it has been established that Eaton had knowledge of its omission at least two (2) months before it brought the omissions to the Court's attention. In sum, the Court cannot permit Eaton's blatant disregard for its discovery directives, and it certainly cannot give Eaton a sincere "pat on the back" for alerting the Court to its failures while Eaton argues that the Court has no jurisdiction to consider the impact and consequences for the same. To buy into Eaton's jurisdictional argument would provide encouragement for discovery "cat and mouse" trickery in Mississippi's trial courts. The lesson to litigants would be: hide crucial documents, but "fess up" when the Notice

of Appeal has been filed, and no consequences will result. Such a "loophole" flies in the face of the purpose of the discovery rules. *See generally Allen v. Nat'l R.R. Passenger Corp.*, 934 So.2d 1006, 1015 (Miss. 2006) (holding "That [the Plaintiff]'s substantive rights were affected when his case was dismissed is without doubt, but such is the nature and purpose of sanctions for discovery violations and hindering the discovery of truth in a lawsuit. To do anything less would not effectively dissuade others from doing the same."); *Turney v. State*, 16 Miss. 104, 119 (Miss. Err. & App. 1847) (holding "It is of the greatest importance in legal proceedings that truth should be ascertained, and this is one of the rules that the law employs to reach that end; it is said to be a rule of the highest importance, and that the strictest observance of it is essential for the discovery of truth and the due administration of justice.").

B. Legal Considerations

It is undisputed by all parties, on the face of the pending pleadings, that the Peters inquiry, and the discovery related thereto, has direct implications on Frisby's pending Counterclaims and Eaton's Answers and Defenses thereto. Further, it is undisputed that this Court has jurisdiction over Frisby's pending Counterclaims. The Counterclaims filed by Frisby and the Engineers, respectively, and the Answers filed by Eaton contain many references to the Peters inquiry, thus making the related proceedings (other than the Complaint's dismissal) very much at issue. In fact, an affirmative defense pled by Eaton is "Counter-Defendants were denied due process of law in the resolution of the motion to dismiss the complaint." *Eaton Answers to Counter-claims*, April 5, 2011, pgs. 8, 19, PLDGS 1367, 1368. Another is "Eaton's statements and communications were true." *Id.* at 7, 16. Eaton's Answers were filed *after* it filed its Notice of Appeal regarding the dismissal.

Mississippi law makes clear that "[t]he burden of proving an affirmative defense lies upon the party who relies upon that defense." *Natchez Elec. & Supply Co., Inc. v. Johnson*, 968 So.2d 358, 361 (Miss. 2007) (internal citations omitted). Eaton's affirmative defenses obviate the relevance of the Peters discovery issues, and raise a genuine issue regarding the truthfulness of "Eaton's statements and communications" as well as regarding the "resolution of the motion to dismiss the complaint." While this Court will not revisit its previous ruling dismissing Eaton's Complaint, which is now before the Mississippi Supreme Court on appeal, this Court will continue to require forthright discovery cooperation, and will consider issues properly before it, including the truthfulness of Eaton throughout the litigation and the parties' compliance with Mississippi's Rules of Civil Procedure. Eaton's own court filings, filed months after its Notice of Appeal, acknowledge the overlap of issues that are present in the dismissal of its Complaint and in the litigation of the Frisby parties' Counterclaims. Further, Eaton's recent filings are an additional concession that this Court retains jurisdiction over the subject discovery dispute and that Eaton's duty to supplement its previous discovery responses continues throughout the litigation of the remaining claims.

On April 17, 2012, more than one year after Eaton filed its Notice of Appeal related to the dismissal of it Complaint, Eaton provided documents to this Court that it concedes were responsive to Frisby's 2008 and 2009 discovery requests. Further, on June 27, 2012, Eaton filed a Supplementation of its previous 2008 and 2009 discovery responses, a direct acknowledgment of this Court's jurisdiction and control over discovery issues that relate directly to the matters pending. It can certainly be argued that Eaton waived any jurisdictional argument with respect to discovery issues by its supplementation. Furthermore, as interpreted by the federal courts of this jurisdiction, a Rule 54(b) dismissal does not preclude changes or revisions to non-dispositive

orders. "The court's ability to reconsider and revise a prior order is not dependent upon a change of law or facts, but is within the discretion of the judge. An order 'may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.'" *Ehlen Floor Covering, Inc. v. Lamb*, 2010 WL 2734728 (M.D. Fla. 2010) (citing Fed.R.Civ.P. 54(b). *See, e.g., Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 862 (5th Cir.1970) (an interlocutory order can be modified or rescinded at any time before it becomes final)).

Finally, as further explained herein, Eaton's most recent discovery supplementation is incomplete and untimely. As emphasized by the Mississippi Supreme Court, "M.R.C.P. Rule 26(f)(2) states that '[a] party is under a duty to seasonably amend a prior response if he obtains information' which renders the initial response inadequate or where "a failure to amend the response is in substance a knowing concealment.' 'Seasonably' does not mean several months later. It means immediately." *W. v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 721 (Miss. 1995) (internal citations omitted). First, Eaton has conceded that it discovered the discovery lapse several months prior to furnishing the April 17, 2012 documents, thereby rendering the supplementation untimely. Second, Eaton failed to include many documents that are clearly responsive, both in its initial discovery responses and in its supplementation, which makes Eaton's supplementation incomplete, or a "knowing concealment." M.R.C.P. 26(f)(2). The discovery issues before the Court are separate and distinct from this Court's December 22, 2010 Opinion regarding the dismissal of Eaton's Complaint. Thus, the Court retains jurisdiction over these matters.[17]

[17] Rule 54(b) provides discretion to the court in directing a final judgment as to "one or more but fewer than all of the claims or parties..." M.R.C.P. 54(b). As can be clearly ascertained from the December 22, 2010 Final Judgment, this Court only certified for appeal its dismissal of "the Plaintiffs' Complaint and all claims against tbe Defendants." *See December 29, 2010 Final Judgment of Dismissal with Prejudice.* Pursuant to M.R.C.P. 54(b), the Counterclaims remain properly before this Court.

II. M.R.E. 502(d)(1), the "Crime-Fraud Exception"

Under consideration is the June 4, 2012 Report and Recommendation of Special Master Dogan and the related objections thereto. In the June 4, 2012 Report and Recommendation, Special Master Dogan reviewed more than 15,000 documents *in camera*, in an expedited fashion. The Court commends the Special Master's diligence and timeliness. As a result of his review, the Special Master recommended that nine (9) of the documents reviewed qualified as discoverable, pursuant to the "crime-fraud" exception found in M.R.E. 502(d)(1). After this Court's independent review, the Court agrees with certain recommendations of the Special Master, but the Court has determined that considerably more documents submitted *in camera* qualify under M.R.E. 502(d)(1).[18] After a discussion of the applicable law considered in its rulings herein, the Court issues its document-by-document findings.

A. The Purpose of *In Camera* Review

"[T]rial courts have considerable discretion in discovery matters, and their decisions will not be overturned unless there is an abuse of discretion." *Beck v. Sapet,* 937 So.2d 945, 948 (Miss.2006). Likewise, "[f]ederal courts maintain broad discretion in discovery matters, and the election to conduct an *in camera* review is well within the bounds of that discretion." *United Investors Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.R.D. 483, 486 (N.D. Miss. 2006) (citing *Grand Oaks, Inc. v. Anderson,* 175 F.R.D. 247, 249 (N.D.Miss.1997). In discussing the procedure for an *in camera* review, the *United Investors* court stated: "This court will not grant an *in camera* inspection where, as here, there are potentially hundreds, perhaps thousands, of documents which would require review. To inspect the documents at issue in this action would

[18] M.R.C.P. 53(g)(2) provides the court "may adopt the [Special Master's] report or modify it or may reject it in whole or in any part..."

constitute a great and unnecessary expenditure of judicial resources." *United Investors Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.R.D. 483, 486 (N.D. Miss. 2006).

When this Court entered its May 17, 2012 *Order Requiring Expedited Production*, the undersigned never contemplated that the same would result in the Court's *in camera* consideration of more than 15,000 documents. The documents were provided to the Court by Eaton in an entirely unorganized fashion, following no chronological order and accompanied by a blanket assertion of privilege and no accompanying privilege log. A blanket privilege claim without a privilege log is expressly prohibited in federal court, and logically so.[19] F.R.C.P. 26(5). The production resulting from this Court's May 10, 2012 directive was a logistical nightmare requiring Special Master Dogan and this Court to expend many hours, not just reviewing the documents, but putting them in date order, assembling the multiple duplicate pages and searching for missing pages. Ordinarily, the Court would not have undertaken such an enormous effort resulting from a party's failure to comply with its directives. However, the circumstances presented are far from ordinary. In the course of this Court's *in camera* review, the Court identified *hundreds* of pages of documents that were unequivocally responsive to previous discovery requests, documents that were directly contrary to sworn testimony given by Eaton employees and counsel in this litigation, and documents that were representative of an ongoing cover up by Eaton and its affiliates of its misdeeds. Of course, those documents, which will be identified herein, caused the Court grave concern, but most alarming is Eaton's failure to identify most of the documents as responsive even now. As a result, the Court felt compelled to complete this extraordinary review to fully ascertain the extent of Eaton's ongoing discovery failures, despite Eaton's numerous opportunities for full and complete disclosure.

[19] The Frisby parties moved for the Court to require Eaton to provide a Privilege Log, and Eaton objected, complaining that the same would require too much additional work. The Court required Eaton to provide a privilege log to include only the small number of documents addressed in the June 4, 2012 Report and Recommendation.

Throughout the Peters inquiry, Eaton has made much ado about its offer to bring to this Court, for *in camera* review, every document mentioning Peters. *Motion of Eaton Corporation for Protective Order and Establishing Procedures for Review*, April 24, 2008, PLDG. 521. Instead, in 2008, this Court elected to utilize a more orderly procedure for identifying documents relevant to the Peters inquiry, using the familiar rules of civil procedure governing discovery. The Court opted for this procedure in order to place the burden of identifying responsive documents on the parties, as contemplated by the discovery rules, and to avoid an inordinate expenditure of judicial resources in reviewing thousands of pages of documents. The failures of Eaton to cooperate in discovery were made known in 2009, when documents were "inadvertently" omitted from Eaton's discovery review or "inadvertently overlooked" by Eaton when responding. See *Leo Affidavits*, November 9, 2009, PLDG. 1055. Additional failures were made known by Eaton's acknowledgment in its various May 2012 Affidavits. *Eaton Corporation Affidavits*, May 17, 2012, PLDG. 1523-1528. However, after this Court's review of the thousands of documents herein, the Court realizes that placing the initial burden on Eaton with expectations of compliance with the applicable discovery rules was misplaced. The Court's review made clear that Eaton continues to be less than forthcoming in discovery. Therefore, in the interests of justice and in an effort to prevent yet another similar discovery dispute, the Court undertook a massive *in camera* review, the necessity of which is clearly shown by the content of the documents discussed below.

B. The Court's General Findings, pursuant to *Hewes v. Langston*

a. The Privileges

M.R.E. 502 defines the privilege afforded to lawyers and their clients. In discussing the relationship between a lawyer and his client, the United States Supreme Court stated:

> We have recognized the attorney-client privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Although the underlying rationale for the privilege has changed over time, see 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961), courts long have viewed its central concern as one "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn,* 449 U.S., at 389, 101 S.Ct., at 682. That purpose, of course, requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings, *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice," *Hunt v. Blackburn,* 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888).

U.S. v. Zolin, 491 U.S. 554, 562 (1989). In *Hewes v. Langston*, Mississippi's leading case regarding the crime-fraud exception, the Mississippi Supreme Court explained:

> This Court has interpreted the scope of the attorney-client privilege under Mississippi law broadly, stating: the privilege relates to and covers **all information** regarding the client received by the attorney in his professional capacity and in the course of his representation of the client. Included are communications made by the client to the attorney and by the attorney to the client. In that sense it is a two-way street. *Barnes v. State,* 460 So.2d 126, 131 (Miss.1984) (emphasis added). Further: "[t]he privilege does not require the communication to contain purely legal analysis or advice to be privileged." *Dunn v. State Farm Fire & Cas. Co.,* 927 F.2d 869, 875 (5th Cir.1991) (applying Mississippi law). "Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged." *Id.* at 875.

Hewes v. Langston, 853 So.2d 1237, 1244 (Miss. 2003). While recognizing the importance of the privilege, the *Zolin* court also stated that "[t]he attorney-client privilege is not without its

costs," and "it applies only where necessary to achieve its purpose." *Zolin* at 562 (internal citations omitted).

M.R.C.P. 26(b)(1) and M.R.C.P. 26(b)(3) consist of the "work product doctrine," and afford protection to "an attorney's thoughts, mental impressions, strategies and analysis from discovery by opposing counsel." *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So.3d 474, 492-93 (Miss. 2010), reh'g denied (Sept. 16, 2010) (citing *Hewes v. Langston,* 853 So.2d 1237, 1245 (Miss.2003) (citing *Hickman v. Taylor,* 329 U.S. 495, 510–11, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947)). As recognized by the Mississippi Supreme Court, the work-product doctrine:

> 'does not exist to protect a confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent." [*Shields v. Sturm, Ruger & Co.,* 864 F.2d 379, 382 (5th Cir.1989)]. Without this ..., '[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.' *Hickman,* 329 U.S. at 511, 67 S.Ct. 385.... *Hewes,* 853 So.2d at 1245.

Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So.3d 474, 493 (Miss. 2010), reh'g denied (Sept. 16, 2010). The Mississippi Supreme Court has defined protected work product as a "privilege" that "protects documents prepared in anticipation of litigation, unless the party seeking discovery has a substantial need of the materials and is unable without undue hardship to obtain the equivalent of the materials by other means." *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1247 (Miss. 2005). The *Morrison* court further held that "[e]ven where such documents are, upon appropriate showing, deemed discoverable, 'the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'" *Id.* (citing M.R.C.P. 26(b)(3)). Notably, just as the attorney-client privilege is subject to exception, so is the work

product privilege. As best explained by the Fifth Circuit Court of Appeals: "When the case being prepared involves the client's ongoing fraud, however, we see no reason to afford the client the benefit of this doctrine. It is only the 'rightful interests' of the client that the work product doctrine was designed to protect." *In re Intl. Sys. and Controls Corp. Securities Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (internal citations omitted).

b. The Exception

In Mississippi, confidential communications between lawyers and clients, as defined by M.R.E. 502, are protected unless one of five possible exceptions applies. M.R.E. 502(d). M.R.E. 502(d)(1) represents the "crime-fraud exception" to the attorney client privilege, which states: "There is no privilege under this rule: If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." M.R.E. 502(d)(1). In defining the meaning behind the exception, the United States Supreme Court held that "[i]t is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," *ibid.*, between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *Zolin* at 563 (internal citations omitted). As recognized in *Hewes*, the Mississippi Supreme Court "has not spoken as to whether the crime-fraud exception applies to the work product doctrine, [but] the Fifth Circuit has held that it does, as have the Second and Third Circuits." *Hewes v. Langston*, 853 So.2d 1237, 1246 (Miss. 2003) (internal citations omitted). In 1982, the Fifth Circuit Court of Appeals held that the "crime-fraud exception applies to work product," acknowledging that "[e]very court of appeals that has addressed the crime-fraud exception's application to work product has concluded that it does

apply." *In re Intl. Sys. and Controls Corp. Securities Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (citing *E.g. In re John Doe Corp.,* 675 F.2d 482, 492 (2d Cir.1982); *In re Grand Jury Proceedings,* 604 F.2d 798, 803 (3d Cir.1979)). The *Hewes* court implicitly accepted the Fifth Circuit's rationale, and cited the "two-part test for determining whether the crime-fraud exception applies to materials protected by the work product doctrine: (1) there must be a prima facie showing of a violation sufficiently serious to defeat the work product privilege, and (2) the court must find some valid relationship between the work product under subpoena and the prima facie violation." *Hewes v. Langston*, 853 So. 2d 1237, 1246 (Miss. 2003) (citing *In re Intl. Sys. and Controls Corp. Securities Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982)). Accordingly, the Court, in its item by item analysis, will consider whether the crime-fraud exception applies to each document, whether protected by the attorney client or the work product privilege, or both.

C. <u>The Documents at Issue and the Applicability of the "Crime-Fraud Exception"</u>

Following the United State Supreme Court's holding in *Zolin*, the *Hewes* court reiterated that "[b]efore a trial judge may engage in an in camera review, the party seeking disclosure must show "a factual basis adequate to support a good faith belief by a reasonable person," that *in camera* review will show the applicability of the [crime-fraud] exception." *Hewes* at 1246 (citing *Zolin,* 491 U.S. at 572, 109 S.Ct. 2619). Further, *Hewes* explains that "[t]he evidentiary burden that the party seeking disclosure must meet before *in camera* review is appropriate is therefore significantly less than is needed to actually overcome the privilege itself. Once a party seeking disclosure of allegedly privileged materials sets forth a prima facie case that the crime-fraud exception applies, the decision of whether to engage in an *in camera* review is committed to the sound discretion of the trial court." *Id.*

In its May 18, 2012 *Order of Reference*, this Court addressed the preliminary *prima facie* requirement of *Hewes*, holding:

> Notably, the Court finds that this review shall incorporate this Court's previous findings on June 19, 2009, including the finding of a prima facie evidence of a crime or a fraud. The recently produced documents on April 17, 2012, further support that finding. Accordingly, no additional findings regarding the prima facie requirement are necessary, as the Court and the Special Master have spent considerable time on that issue previously.

Order of Reference, May 18, 2012, pg. 2, PLDG. 1529. Following a satisfaction of the preliminary *prima facie* requirement, the Court exercised its "discretion" in determining the necessity of "whether to engage in an *in camera* review." *Hewes* at 1246.

Of note is Eaton's apparent interpretation of the *prima facie* requirement. On May 22, 2012, the Court received WC-Eaton 595, and due to the content thereof, the Court requested Eaton to furnish additional related documents for *in camera* consideration. *See May 23, 2012 E-mail to Counsel from Judge Weill's Clerk.*[20] Eaton complied, but filed an *Objection to Review of Certain Documents*. In overruling Eaton's Objection, the Court held:

> In *Eaton's Response and Limited Objection to Special Master's Report and Recommendation Dated June 4, 2012*, Eaton admits that WC-Eaton 595 contains a reference to "whether Eaton should add someone to its legal team who knows Judge Yerger." *Response* pg. 7. This statement, placed in context with other statements in this document and with other documents in this case, certainly serves as a reasonable basis that an *in camera* review of related documents may show further applicability of the crime fraud exception beyond Judge DeLaughter's recusal. This Court agrees with Eaton that taken alone "it is not impermissible or unethical to have counsel who knows a judge." *Response*, pg. 7. However, when considering Eaton's actions throughout this case, WC-Eaton 595 requires full consideration by this Court, including consideration of other similar documents.

[20] The e-mail stated, in part: "In view of the additional documents submitted by Eaton yesterday, the Court directs that all handwritten notes of Victor Leo, Sharon O'Flaherty and the author of the recently produced Eaton 595 (if not Leo or O'Flaherty), which relate to the subject litigation, be submitted for in camera review. The documents should, at this time, include only the time period of November, 2006 through December, 2009 (unless any documents either before or after the subscribed time period relate in any way to Ed Peters and have not yet been produced). In addition, the Court directs that Eaton prepare a privilege log related to this submission, which identifies the author of each document."

Order Overruling Eaton's Objection to Review of Certain Documents, June 18, 2012, pg. 3, fn. 2, PLDG. 1546. At the June 29, 2012 hearing regarding the June 4, 2012 Report and Recommendation, counsel for Eaton referenced this Court's *Order*, and stated that the above-cited footnote actually served as additional "prima facie [findings] that require investigation." Eaton further contended that unless the documents provided subsequent to WC-Eaton 595 by Eaton state "Judge Yerger just can't tell me no," [or something to that effect], then "they [Frisby] are not entitled to it." *June 29, 2012 Hearing Transcript*, pg. 30. This is significant, because the Court finds that Eaton's interpretation of the *prima facie* requirement to be far too restrictive.

As defined by the Fifth Circuit Court of Appeals, "[a] prima facie case is one that "has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded." *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 203, 8 Fed. R. Evid. Serv. 137 (5th Cir. 1981) (quoting Black's Law Dictionary (4th ed.)). Accordingly, based upon that definition, Eaton will expectedly put forth evidence that its' query, found in WC-Eaton 595, of whether to add someone to its legal team who knew Judge Yerger is commonplace in the legal community. However, it is certainly plausible, when considering all of the circumstances, to presume that Eaton's query conveyed Eaton's intentions to continue its pattern of attempting improper influence upon a Mississippi judge. This is even more significant when considering that this statement in WC-Eaton 595 was made *after* the allegations regarding Peters and Judge DeLaughter were known to Eaton and to the public. A *prima facie* case may be made against a party, even when the party attempts to rebut the basis for the same. If the fact finder finds that the attempted rebuttal is not credible, the *prima facie* finding still stands. This concept is familiar in the case *sub judice*. This Court, in its December 22, 2010 Opinion, dismissed Eaton's

Complaint; the Court served as the fact finder considering all of the evidence and giving appropriate weight and credence to certain evidence, and found that Eaton's attempt to rebut the Court's *prima facie* findings was not well-taken.

a. Eaton's Initial Fraud Upon the Court

Extensive rulings regarding what constitutes "fraud upon the court" in the context of the "crime-fraud exception" are not abundant in Mississippi or in other jurisdictions. However, Mississippi's appellate courts have utilized a relevant definition of "fraud upon the court," albeit in a somewhat different context than the context presented by the case *sub judice*. Mississippi Courts have stated: "Fraud upon the court should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *In re Est. of Pearson*, 25 So. 3d 392, 395 (Miss.Ct.App. 2009) (cert. denied, Jan. 7, 2010) (citing *Tirouda v. State,* 919 So.2d 211, 213 (Miss.Ct.App. 2005) (citing 7 Moore, Federal Practice P 60.33 at 515 (1971)). The *Pearson* court further explained that "[r]elief 'based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *In re Est. of Pearson* at 395 (citing *Wilson v. Johns-Manville Sales Corp.,* 873 F.2d 869, 872 (5th Cir.1989)). The Mississippi cases citing to aforementioned *Moore's Federal Practice* definition concern a party's attempt to set aside a final judgment due to alleged fraud, pursuant to M.R.C.P. 60. The lack of those specific circumstances herein does not negate the application of "fraud upon the court," as aptly defined in *Tirouda* and *Pearson. Id.*

During *In Camera Phase I* of this Court's document review, the Court made extensive findings regarding Peters' and Eaton's "fraud upon the court," utilizing the very same definition cited in *Tirouda* and since cited in *Pearson. In re Est. of Pearson*, 25 So. 3d 392, 395 (Miss.Ct.App. 2009) (cert. denied, Jan. 7, 2010) (citing *Tirouda v. State*, 919 So.2d 211, 213 (Miss.Ct.App. 2005)). The Court hereby re-adopts those findings herein, particularly the findings made in this Court's June 19, 2009 Opinion/Order. *See Opinion/Order* June 19, 2009. PLDG. 909.

Without repeating its earlier findings, the Court will specifically address one point that Eaton continues to assert. In sum, Eaton contends that even if Peters *was* secretly consulting with and improperly influencing Judge DeLaughter, no harm was done, because Judge DeLaughter's decisions were legally sound, and some were even unfavorable to Eaton. See generally *Brief of Appellant Eaton Corporation and Related Companies*, Supreme Court No. 2011-CA-19, pg. 27; 29-31 (Asserting that even if Eaton did know of the *ex parte* contacts, the question is whether the contacts "prejudiced Frisby on the merits."). Eaton's argument is akin to an assertion that a robber who broke into a home but walked away with nothing, or with something nominal such a plastic pearl necklace, is not really a robber. This rationale is negated by instructive holdings in multiple jurisdictions that "the crime-fraud exception does not require a completed crime or fraud but only that the client have [sic] consulted the attorney in an effort to complete one." *In re Grand Jury Proceedings*, 87 F.3d 377, 381, 35 Fed. R. Serv. 3d 515 (9th Cir. 1996) (citing *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co. A.G.),* 731 F.2d 1032, 1039 (2d Cir.1984)). "Moreover, inasmuch as the government [or the party seeking privileged documents] need not establish, for purposes of the crime-fraud exception, that the crimes succeeded, the government [or the party seeking privileged documents] is not required to

prove that the communications [of the client] with [the attorneys] *in fact* helped the targets commit the crimes. *In re Grand Jury Proceedings*, 87 F.3d 377, 382 (9th Cir. 1996) (See *also In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co. A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984) ("[i]f a fraudulent plan were ineffective, the client's communications would not thereby be protected from disclosure")). In a case concerning e-mails with a fraudulent and/or criminal instruction from a client to an attorney, with factual circumstances similar to the case *sub judice*, it was stated that "the minutes of its annual meeting (backdated, if necessary) [must show] that J.T. LeRoy is an authorized signatory for contracts." *Antidote Intern. Films, Inc. v. Bloomsbury Publishing*, PLC, 242 F.R.D. 248, 250 (S.D. N.Y. 2007). The court held that the author, through the language of the e-mail, effectively asked the attorney for assistance in procuring fraudulent corporate documents. *Id.* As a result, the court concluded that the crime fraud exception applied and "the email would provide a prudent person with a reasonable basis for suspecting the attempted perpetration of a fraud, and the email itself is plainly in furtherance of the *attempted* fraud." *Id.* (emphasis added).

Accordingly, based upon Mississippi law and upon relevant holdings from other jurisdictions, it seems logical that the question dictating whether a document or communication is subject to the crime-fraud exception is whether the communication was made in furtherance of a crime or fraud, no matter whether the fraudulent or criminal scheme was successful.

b. Eaton's Ongoing Cover up

Many of the documents discussed herein warrant additional findings of the "fraud upon the court" perpetrated by Eaton and Peters. In addition, many of the newly produced documents evidence ongoing cover up efforts by Eaton and its attorneys of the original fraud. Hence, many

of the Court's specific findings concern the "crime-fraud exception" as it relates to Eaton's *cover up* of the ongoing fraud. Other documents contain additional evidence of the *initial* fraud perpetrated by Eaton and Peters, through improper *ex parte* contacts with Judge DeLaughter, explicitly and implicitly sanctioned and encouraged by Eaton. However, in addition to containing proof of the *initial* fraud on the court, these documents *now* also contain evidence of *cover up* efforts by Eaton and its counsel, because Eaton failed to disclose these documents years earlier, as required.

The Court finds that both the *initial* and *ongoing* fraud on the court by Eaton and Peters are contemplated by M.R.E. 502(d)(1). When asked by this Court whether any document indicating a cover up of a previous fraud would be subject to the "crime-fraud exception," Eaton's counsel stated that "it [was] the evidence of a different crime or fraud that has not yet been found." *June 29, 2009 Hearing Transcript*, pg. 44. Eaton apparently contends that a separate *prima facie* case must be made before a document evidencing the cover up of ongoing fraud can be subject to the crime-fraud exception. This Court disagrees. In Mississippi, "Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud." *Comment*, M.R.E. 502(d)(1). The cover up evidenced in the documents, as explained in the findings below, relates back to this Court's original *prima facie* finding, because it is an ongoing result of the same fraud; any cover up effort, by its very nature, is a "future crime or fraud" as a cover up is ongoing into the future. *Id.*

In our sister Mississippi federal courts, the law is clear that a *continuing* crime or fraud eviscerates the attorney client or work product privileges. "Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome 'where communication or work product is intended to further *continuing* or future criminal or fraudulent activity.'" *U.S. v.*

Edwards, 303 F.3d 606, 618 (5th Cir. 2002) (citing *In re Grand Jury Subpoena,* 220 F.3d 406, 410 (5th Cir.2000) (quoting *United States v. Dyer,* 722 F.2d 174, 177 (5th Cir.1983) (emphasis added)). In *Edwards*, the Fifth Circuit Court of Appeals held that "[r]ather than merely defending himself against civil actions alleging past wrongdoing, Brown [when consulting with his civil attorneys] was actively continuing the cover up of his extortion and perpetuating his tax fraud." *U.S. v. Edwards*, 303 F.3d 606, 619 (5th Cir. 2002). When the fraudulent or criminal actions are ongoing even legal advice regarding the past fraud may be subject to the exception, as "occasional backward looks [are often] only part of a forward looking scheme that drew on these validations." *In re Grand Jury Subpoenas*, 561 F.3d 408, 412-13 (5th Cir. 2009).

Holdings from other jurisdictions are also instructive when considering privilege implications in the context of ongoing fraud. *In re Sealed Case*, 754 F.2d 395, 400 (D.C. Cir. 1985), is a case involving Synanon Corporation's "willful, deliberate and purposeful scheme to ... destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing upon Synanon's complaint....The scheme further had as its purpose to cover up and conceal this destruction of evidence and discoverable materials by giving false testimony in deposition..." *Id.* at 400. In determining the applicability of the crime-fraud exception, under a factual scenario similar to that before this Court, the District of Columbia court stated:

> This "egregious misconduct" amounts to "a scheme to interfere with the judicial machinery performing the task of impartial adjudication, ... by preventing the opposing counsel from fairly presenting ... [its] case or defense." *Pfizer, Inc. v. International Rectifier Corp.,* 538 F.2d 180, 195 (8th Cir.1976). More than mere fraud between the parties, or an isolated instance of perjury, plaintiff has compounded its "unconscionable plan," *England v. Doyle,* 281 F.2d 304, 309 (9th Cir.1960), by its indisputable misconduct before this court.

In re Sealed Case, 754 F.2d 395, 400 (D.C. Cir. 1985). The court, in *In re Sealed Case*, also distinguished any past misconduct from future misconduct, stating "[t]o the limited extent that past acts of misconduct were the *subject* of the cover up that occurred during the period of representation, however, then past violations properly may be a subject of grand jury inquiry [and subject to the crime fraud exception]." *Id.* at 402. As explained by the United States District Court for the Eastern District of Michigan, "[w]hether construed as part of the Defendant's initial fraud or as a distinct, subsequent fraud, the active concealment of a fraud is not protected by the attorney-client privilege." *State Farm Mut. Auto. Ins. Co. v. Hawkins*, 2011 WL 595694, *6 (E.D. Mich. 2011) (citing *In re Sealed Case,* 754 F.2d 395, 402 (D.C.Cir.1985); *In re John Doe Corp.,* 675 F.2d 482, 491–92 (2d Cir.1982); *United States v. Skeddle,* 989 F.Supp. 890, 904 (N.D.Ohio 1997)).

Finally, the Court finds that certain missing documents, especially e-mails that seem to be missing text or missing responses and missing corresponding time entries, also contribute to this Court's findings of "fraud on the court" herein. As aptly stated by the United States Court of Appeals for the Third Circuit:

> In this era, when communications between leaders of business organizations are transmitted to their employees by email rather than by phone or mail, examination of those emails is the method most commonly used by government investigators. That is evident to those engaged in the criminal or fraudulent activity that is the subject of the investigation. It should therefore come as no surprise that efforts to forestall such investigations frequently take the form of deletion of past emails. *See, e.g., Arthur Andersen LLP v. United States,* 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005).

In re Grand Jury Investigation, 445 F.3d 266, 277 (3d Cir. 2006).

III. Findings of Fact and Conclusions of Law Regarding the Documents

In *Hewes v. Langston*, the Mississippi Supreme Court reiterated that trial courts should address discovery challenges on an "item by item basis." *Hewes v. Langston*, 853 So. 2d 1237, 1250 (Miss. 2003). The following is this Court's "item by item" analysis of the applicable documents reviewed *in camera*. The documents discussed herein are the result of this Court's review of the approximately 15,299 documents submitted by Eaton. As evident from the findings herein, an innocuous-seeming act is often not so when considering the other events during that particular time period. The Court accepts the recommendations of Special Master Dogan insomuch as they comport with the Court's rulings herein. Otherwise, the Court's rulings herein serve as its modification of the Special Master's report, as permitted by M.R.C.P. 53(g)(2). The Court will discuss its analysis of each document by dividing the documents into the following three subcategories:

A. Documents Responsive to Previous Discovery Requests

B. Newly Produced Documents which Contain Further Evidence of the ongoing "Fraud Upon the Court" and cover up of the same

C. Documents Requiring Additional Information

For each of the three subcategories listed above, the documents are divided into six sections for ease of reference. The six sections of documents represent the order in which the documents were produced to the Court for *in camera review*, and are categorized as the following:

1) Documents Initially Produced by Eaton on May 17, 2012 and May 22, 2012

2) Corresponding Invoices Submitted by Eaton on May 31, 2012 and June 12, 2012

3) Eaton Pre-2008 Handwritten Notes of Leo and O'Flaherty

4) Eaton Post-2008 Handwritten Notes of Leo and O'Flaherty

5) Belatedly Produced Phelps Dunbar Documents

6) Peters Documents

Finally, the Court notes that it has attempted to balance the sensitive nature of the documents and the requirements of *Hewes* for specific findings. For that reason, the Court includes direct references from the text of the documents only when necessary. The Court has carefully considered which portions of the documents discussed below should be produced, pursuant to *Hewes*, and the Court has ordered production in limited form where indicated.

A. Documents Responsive to Previous Discovery Requests

The Court finds that the following documents should have been produced for *in camera* review in 2008 and 2009, were responsive to discovery requests propounded by Frisby, and contain evidence of Eaton's and Peters' furtherance of the fraud perpetrated on the Court.[21] The following documents are responsive to previous discovery requests of Frisby:

1) Documents Initially Produced by Eaton on May 17, 2012 and May 22, 2012;

2) Corresponding Invoices Submitted by Eaton on May 31, 2012 and June 12, 2012[22]:

WC-Q & B 4755-4756; WC-Q & B 82-83- This document is a January 18-22, 2007 e-mail chain, ending with an e-mail from Peters, which contains an indication that Peters had spoken

[21] Included in the first category are documents that the Court finds should have been produced in response to discovery requests made by Frisby in 2008 and 2009. Due to the extraordinary volume of documents involved in this *in camera* review (and in the Phase I *in camera* review), it is possible that the following list may reference a document that was in fact produced in response to Frisby's discovery requests, but was not, at that time, found to qualify under M.R.E. 502(d)(1). It is also possible that one or more of the documents listed was previously produced- it is especially difficult to determine, because the numbering systems are vastly different in Phases I and II and the Court has seen many duplicates in Phases I and II. Regardless of whether a document is mistakenly labeled as not earlier produced in 2008 and 2009, the Court finds that the documents, produced for the Court's consideration at this time, *now* fall within the crime-fraud exception, regardless if its earlier ruling did not include the same.

[22] Subcategories (1)- Documents Initially Produced- and (2)-Corresponding Invoices- are discussed together for purposes of continuity. In addition, if a document is to be produced in limited form, it is so indicated. Otherwise, the entire document shall be produced.

with Judge DeLaughter and knew how he would rule on the Plaintiffs' Motion to Lift Discovery Stay. While the communication may not have been an obvious indication of *ex parte* contact at the time it was sent, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Thus, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), this document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with Judge DeLaughter and had knowledge about a ruling before it was entered. Peters was privy to accurate inside knowledge of Judge DeLaughter's forthcoming rulings as early as January 22, 2007. Eaton filed its Motion to Lift Discovery Stay on March 1, 2007 and, as Peters predicted, Judge DeLaughter "wait[ed] until his order" on the sanctions issue and granted the Motion on April 6, 2007. This document shall be produced.

Corresponding Invoice-WC-Q & B 5314-5316- These invoice entries pertain to the aforementioned e-mail chain. Notably, on January 18, 2007, Emily Feinstein, an associate attorney with Quarles & Brady, solicited an opinion from Peters regarding whether Eaton should file the Motion to Lift Stay. Peters responded on January 22, 2007, with an indication or suggestion that he had conferred with Judge DeLaughter. Time entries are considered detailed billing records that would ordinarily be protected by the attorney-client and work product privileges, pursuant to *Hewes v. Langston, supra.* However, the Court finds that these entries evidence furtherance of the fraud on the court perpetrated by Eaton, its counsel and Peters, as the

invoices omit any reference to Eaton's reliance on Peters regarding this issue. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. These documents shall be produced.

WC-Eaton 16- This document is a March 8, 2007 e-mail from Michael Schaalman, outside counsel for Eaton, which contains an indication that Peters had spoken with Judge DeLaughter and knew how he would rule on the Plaintiffs' Motion to Lift Discovery Stay. While the communication may not have been an obvious indication of Schaalman's knowledge of Peters' *ex parte* contact at the time it was sent, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with Judge DeLaughter and had knowledge about a ruling before it was entered. Peters was privy to inside knowledge as early as January 22, 2007, and his inside knowledge was correct. Eaton filed its Motion to Lift Discovery Stay on March 1, 2007 and, as Peters predicted, Judge DeLaughter "wait[ed] until his order" on the sanctions issue and granted the Motion on April 6, 2007. This document shall be produced.

Corresponding Invoice-WC-Q & B 5323- The invoice entries are made by Michael Schaalman, on March 7 and March 9, 2007, which omit any reference to the fact that Schaalman was relying on Peters "in anticipation that Judge DeLaughter will grant our motion..." The time entries are detailed billing records that would ordinarily be protected by the attorney-client and work product privileges, pursuant to *Hewes v. Langston, supra.* However, the Court finds that these time entries evidence furtherance of the fraud on the court perpetrated by Eaton, its counsel, and Peters, as the invoices omit any reference to Eaton's reliance on Peters regarding this issue. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. The document shall be produced in limited form, including the top headings, category headings, and the March 7, 2007 and March 9, 2009 by professional "MS2."

WC-Q & B 191- This document is a March 15, 2007 e-mail from Peters, which contains an indication that Peters had spoken with Judge DeLaughter and knew how he would rule on the Plaintiffs' Motion to Lift Discovery Stay. The communication should have been an obvious indication of *ex parte* contact at the time it was sent, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14,

2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with Judge DeLaughter stating "I don't think he [DeLaughter] has ever faced this before" and "Hope this helps-it's about the best I can do." It is unusual that Peters (an attorney who did not have much civil experience) would know whether DeLaughter had faced a certain civil litigation issue as a judge unless Peters had talked with DeLaughter about it. This is further supported by Peters' statement "it's about the best I can do." This document shall be produced.

Corresponding Invoice-WC-Q & B 5250; 5321-5322- The dates of these billing entries cover the time period for Peters' March 15, 2007 e-mail to the Eaton team, which contained an overt "indication or suggestion" that Peters had talked with Judge DeLaughter. The time entries are detailed billing records that would ordinarily be protected by the attorney-client and work product privileges, pursuant to *Hewes v. Langston, supra.* However, the Court finds that these entries evidence furtherance of the fraud on the court perpetrated by Eaton, its counsel and Peters, as the invoices omit any reference to Eaton's reliance on Peters regarding this issue. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. This document shall be produced in limited form, beginning with the final entry dated 3/15/07 at the bottom of Q & B 5321. The entire portions of Q & B 5250 and 5322 shall be produced.

WC-Phelps 18-21- This document contains handwritten notes of an Eaton conference call on March 30, 2007. They appear to be the notes of Justin Matheny, a then-associate with Phelps Dunbar, but the author's identity is not certain. The notes contain evidence of Eaton's furtherance of the fraud on the Court through the statement: "Ed thinks DeLaughter should be presented with a motion" - "Ed will address on a separate call." This document serves as an early indication that Peters only relayed his improper *ex parte* communications with certain team members for Eaton. Moreover, the reference "Ed thinks DeLaughter should be presented with a motion," considered in context with his intentions to "address on a separate call," and with the many other documents evidencing improper *ex parte* contact, is another indication that Peters had spoken, *ex parte*, to Judge DeLaughter. The communication may not have been an obvious indication of *ex parte* contact in 2007, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated, or was expected to successfully communicate with Judge DeLaughter. This document shall be produced, in limited form, as follows: from the beginning of Phelps 18 until "w/ a Motion."

Corresponding Invoice: None.

WC-Eaton 329- This document is the April 7, 2007 e-mail chain regarding Vic Leo's "100% chance" prediction that was previously produced, in part. The Court finds that in view of the newly produced documents, this document should now be produced in its entirety, as the context therein has direct bearing on the recipients' and the sender's knowledge. Pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with Judge DeLaughter, and it also evidences knowledge of the described communications by Eaton employees. Furthermore, the Court finds that the reference to a "motion to disqualify" Peters is directly responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Peters' involvement on behalf of Eaton." This document shall be produced.

Corresponding Invoice - WC-Q & B 5326- Vic Leo's April 7, 2007 e-mail followed Judge DeLaughter's ruling, which was entered on April 6, 2007. On April 6, 2007, Quarles and Brady associate Brian Gaschler documented a time entry for "conference with M. Schaalman...consideration of issues related to discovery responses and drafting additional discovery requests for defendants *once* discovery stay is lifted." (emphasis added). Based on the text of the entry, it seems that Judge DeLaughter's opinion lifting the stay had not yet been entered, but Gaschler had knowledge of the forthcoming ruling. In addition, this billing record contains Schaalman's April 6, 2007 time entry of "confer with Vic Leo and Sharon O'Flaherty regarding DeLaughter decision." Leo then sent the corresponding e-mail informing his Eaton colleagues that Judge DeLaughter ruled as Schaalman and Peters had "anticipated." Accordingly, this document shall be produced.

WC-Eaton 17- This document is an April 7, 2007 e-mail from Michael Schaalman to the Eaton litigation team, which contains an indication that Peters had spoken with Judge DeLaughter, through Schaalman's reference of Eaton's "December date with the defendants." The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering WC-Eaton 329, Vic Leo's earlier e-mail about Peters' "intentions to speak with the court administrator and the judge Monday about the trial date. This may take some finessing." The trial date was a highly disputed issue. Consequently, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated, or was expected to successfully communicate with Judge DeLaughter, at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

Corresponding Invoice - WC-Q & B 5326- Vic Leo's April 7, 2007 e-mail followed Judge DeLaughter's ruling, which was entered on April 6, 2007. On April 6, 2007, Quarles and Brady associate Brian Gaschler documented a time entry for "conference with M.Schaalman...consideration of issues related to discovery responses and drafting additional discovery requests for defendants *once* discovery stay is lifted." (emphasis added). Based on the text of the entry, it seems that Judge DeLaughter's opinion lifting the stay, had not yet been

entered, but Gaschler had knowledge of the forthcoming ruling. Moreover, this billing record contains Schaalman's April 6, 2007 time entry of "confer with Vic Leo and Sharon O'Flaherty regarding DeLaughter decision." Leo then sent the corresponding e-mail informing his Eaton colleagues that Peters would secure Eaton its desired trial date. Schaalman then responded referencing "our December date." Accordingly, this document shall be produced.

WC-Phelps 8-10- These documents are handwritten notes of an Eaton conference call on April 10, 2007. They appear to be the notes of Justin Matheny, a then-associate with Phelps Dunbar, but the author's identity is not certain. The notes contain an indication that Peters had spoken with DeLaughter, through the reference of Frisby's expected "opposition to the Dec. trial date," when there had been no trial date set. The reference "Ed thinks DeLaughter may not require a stay because of criminal trial" is another indication that Peters had spoken to DeLaughter. The communication may not have been an obvious indication of *ex parte* contact in 2007, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering WC-Eaton 329, Vic Leo's earlier e-mail about Peters' "intentions to speak with the court administrator and the judge Monday about the trial date. This may take some finessing." The trial date was a highly disputed issue. The likelihood of the presence of Peters' ongoing *ex parte* contacts was further indicated when Judge DeLaughter denied the Engineers' Motion to Stay due to the criminal trial on June 7, 2007. The Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14,

2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated, or was expected to successfully communicate with Judge DeLaughter. This document shall be produced, in limited form, as follows: from the beginning of Phelps 8 until "w/Peters" and from "Fred/Ed List..." on Phelps 9 until "criminal trial." Phelps 10 shall remain privileged.

Corresponding Invoice-WC-Q & B 5258; 5328- This billing record contains Schaalman's time entry dated April 9, 2007, for a "conference call with Vic Leo, Sharon O'Flaherty and Ed Peters regarding trial schedule..." This is significant as no other local counsel was involved in planning the trial strategy. Furthermore, the Eaton team had a conference call the next day where Peters' inside knowledge of DeLaughter's future rulings was made known again. This document shall be produced.

WC-Eaton 79-80- This document is an April 11, 2007 e-mail from Peters to Eaton's in-house and outside counsel, which contains an indication that Peters had spoken with DeLaughter (and planned to continue to do so), through Peters' reference of "I think things are back on track & we can enjoy the proceedings for a change." The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is

responsive to Frisby's 2008 Interrogatory No. 3A, 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

Corresponding Invoice – WC - Q & B 5259; 5332- This billing record contains an April 11, 2007 time entry from Schaalman referencing "confer with Ed Peters…" This is significant, as the substance of that "conference" does not appear to be documented and the correspondence that is documented from Peters on that date represents furtherance of the "fraud on the court." Therefore, as it relates to the issue regarding this document, this time record shall be produced, limited to the first entry only, dated April 11, 2007.

WC-Q & B 2873- This document is an April 12, 2007 e-mail from Emily Feinstein, Eaton outside counsel to other Eaton team members. Eaton recently conceded that this e-mail may be responsive to prior discovery requests. The Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton intended to shield Peters' involvement from the Frisby parties. This is especially significant as the instructions to shield Peters came six (6) days after DeLaughter's April 6, 2007 Opinion was issued, containing decisions accurately "predicted" by Peters. Eaton has made many arguments that the Defendants knew about Peters' involvement, due to an e-mail mistakenly sent by Peters in January, 2007. The Court is not persuaded by that logic, especially

since the Defendants had absolutely no knowledge of Peters' direct contacts with DeLaughter, at Eaton's behest. Even if Eaton's argument was persuasive (that it was not shielding Peters, because the Defendants knew he was involved), the Court finds that the clear language of this e-mail is directly responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Ed Peters' involvement on behalf of Eaton." The document shall be produced.

Corresponding Invoice- WC- Q & B 5259; 5332- This time record contains the only time entry for Emily Feinstein for the date of April 12, 2007. On that date, Feinstein sent out instructions to keep Peters' involvement secret from the other side, but did not include that in her detailed time record for that date. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" regarding Peters regarding a fraudulent document that is exchanged. Accordingly, this document shall be produced.

WC- Q & B 1117-1118- This document is a May 1, 2007 e-mail chain between counsel for Eaton, including Peters, that references a solicitation by Peters regarding any particular finding to "bring to the court's attention." It is doubtful, given Peters' limited civil litigation experience, that he would be preparing any proposed findings on behalf of Eaton. Accordingly, it seems obvious that if Peters intended to bring any "findings" "to the court's attention," it would be through improper *ex parte* contacts. The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find

that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters was offering to successfully communicate with DeLaughter for Eaton's benefit. On June 4, 2007, DeLaughter ruled in Eaton's favor on this issue. This document shall be produced.

Corresponding Invoice- WC-Q & B 5256- This document shall be produced in limited form, including only the May 1, 2007 time entry for Schaalman as "MS2." The Court finds that this entry goes to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to either omit any reference to any "consultation" or "communication" with Peters or include vague references only. The substance of Schaalman's "conference" with Peters is directly as issue, as evidenced by the previous document.

WC-Q & B 374- This document consists of handwritten notes by an unknown author dated May 14, 2007, containing an outline of an "attorney fees brief" as detailed by Peters. The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in

2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. This document is especially discoverable when considered with WC- Eaton 1320, a document that indicates that Eaton knew that Peters admitted to his attorney that he was sharing Eaton's briefs with DeLaughter. Eaton contends that Peters did legitimate legal work on its behalf, but it is rather dubious that experienced civil litigation attorneys would take wholesale brief-drafting advice from a career criminal prosecutor, such as Peters, unless Peters had inside knowledge as to what the judge requested for inclusion in the brief. Notably, Eaton filed its "attorney fees brief" referenced in WC-Q & B 374 on May 17, 2007, which tracked Peters' suggestions, with the exception of length- Eaton's brief was three pages longer than Peters proposed. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced, in limited form, including the top heading "Mtg", the date, and section (3) until (g).

Corresponding Invoice- None.

WC-Peters 26-28- This document is a June 7, 2007 fax from Mary Gaines, DeLaughter's court administrator, apparently sent to Peters at 3:42 p.m. This document may have already been produced to the Frisby Defendants, and should have been, as it is responsive to Frisby's 2008 Interrogatory No. 4A, as evidence that DeLaughter "was aware that Ed Peters had been employed by Eaton." The document is also responsive to 2008 Interrogatory 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. Finally, this document represents a communication with the Court and is not privileged. This document shall be produced.

Corresponding Invoice- WC-Q & B 5274- This document contains a time entry from Emily Feinstein sending E. Peters "proposed scheduling orders." This entry represents furtherance of the fraud upon the court as Eaton relied upon Peters for obtaining preferential scheduling. This time record shall be produced in limited form, including only the June 7, 2007 entry by "EF9."

WC-Peters 29- This document is a June 4, 2007 fax from Mary Gaines, DeLaughter's court administrator, apparently sent to Peters at 2:14 p.m. This document may have already been produced to the Frisby Defendants, and should have been, as it is responsive to Frisby's 2008 Interrogatory No. 4A, as evidence that DeLaughter "was aware that Ed Peters had been employed by Eaton." The document is also responsive to 2008 Interrogatory 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's

July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. Finally, this document represents a communication with the Court and is not privileged. This document shall be produced.

Corresponding Invoice- None.

WC-Peters 101-112- This document is a June 21, 2007 fax from Mary Gaines, DeLaughter's court administrator, sent to Peters at 4:26 p.m. This document may have already been produced to the Frisby Defendants, and should have been, as it is responsive to Frisby's 2008 Interrogatory No. 4A, as evidence that DeLaughter "was aware that Ed Peters had been employed by Eaton." The document is also responsive to 2008 Interrogatory 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. Finally, this document represents a communication with the Court and is not privileged. This document shall be produced.

Corresponding Invoice- None.

WC-Peters 100- This document is a June 22, 2007 letter from a Mississippi attorney to Ed Peters, wishing Peters "congratulations on joining the firm of Tim Balducci." On February 2, 2008, this Court entered an *Agreed Order to Preserve Evidence*, which contained preservation instructions to include "Ed Peters and any law firm with which [he is] associated" and requiring Eaton to provide notice to any such firm. *See* PLDG. 489.1. On February 5, 2007, Eaton filed its *Certificate of Delivery*, which did not include Tim Balducci's firm. *See* PLDG. 494. Apparently, counsel for Eaton has had custody of this document in Peters' files since early 2008. This document is not privileged and shall be produced, and it provides a possible indication Eaton did not fully comply with this Court's preservation order. This document shall be produced.

Corresponding Invoice- None.

WC-Q & B 1443; Q & B 907- This is a July 11, 2007 e-mail chain between Michael Schaalman and Peters and which was later sent to Steven Berryman, Eaton outside counsel, which contains multiple indications that Peters had spoken with DeLaughter and knew how he would rule on the Plaintiffs' motion regarding Billy Grayson. The communication should have been an obvious indication of ex *parte* contact at the time it was sent, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See*

M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter stating "you LIKELY CAN get an inference instruction" and "Not what the client wants to hear I know." It is unusual that Peters (an attorney who did not have much civil experience) would know what DeLaughter would do with a nuanced civil litigation issue as a judge, unless Peters had talked with DeLaughter about it. The document also evidences Eaton's expectation that Peters would talk with DeLaughter about this issue, as Peters reported "Not what the client wants to hear I know." This communication was prior to Eaton filing its motion, but on November 1, 2007, DeLaughter ruled exactly as Peters reported in this e-mail. This document shall be produced.

Corresponding Invoice- WC-Q & B 5343-5344- These time records reflect the absence of any documentation of Peters' communications regarding his improper *ex parte* contacts with DeLaughter. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. These documents shall be produced.

WC- Q & B 2067- This is an August 17, 2007 e-mail exchange between Steven Berryman and Brian Gaschler, outside counsel for Eaton, and this e-mail represents one of the more egregious examples of Eaton's discovery failures. The statement in the e-mail "and only God knows what Ed's involvement in all of this is" is a direct acknowledgment of concern about Peters' involvement in the litigation. the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 2A, 3A, 4A and 9A and 2008 Requests for Production No. 1A and 7A, and

should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court," as it indicates unease by an associate attorney regarding the nature of Peters' involvement, and that the same was known to Berryman, a partner, and was known or should have been known by Schaalman, another partner. This document shall be produced.

Corresponding Invoice- WC-Q & B 5352-5353- These billing records represent the entries for the date of August 17, 2007, the date that Gaschler stated "only God knows what Ed's involvement in all of this is," clearly furtherance of the fraud on the court. Accordingly, the Court finds the corresponding billing records, limited to the date of August 17, 2007, shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged.

WC-Q & B 897- This is an August 20, 2007 e-mail exchange between Peters and Schaalman, which contains an indication that Peters had spoken with DeLaughter about his Order issued earlier that day. Peters emphasized that he "STRONGLY feel[s] that the Judge has ruled & it is final…" and Peters made reference to an issue that Eaton should be prepared to address if the federal court entered an Order regarding a stay. Due to Schaalman's extensive involvement in the ongoing *ex parte* communications of DeLaughter and Peters, the communication should have been an obvious indication to Schaalman of improper *ex parte* contact at the time it was sent, and the Court further finds that a reasonable person or attorney knowing all of the circumstances, in

2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

Corresponding Invoice-WC Q & B 5353-5355- These entries represent the time records for the date that Peters sent additional information that he gained from improper *ex parte* contact with DeLaughter. The billing records contain no reference to Peters. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. These documents shall be produced, limited to the entries dated August 20, 2007.

WC- Q & B 1820-1823- This is a September 14, 2007 e-mail chain between counsel for Eaton, including an e-mail from Greg Everts, outside counsel for Eaton to Ed Peters and Schaalman. Everts is requesting Peters' "thoughts" about the Defendants' filing a motion with the court "if

they want [Special Master] Jack Dunbar to rule on it." It is doubtful, given Peters' limited civil litigation experience, that he would have any insight as to the rationale for the Defendants' civil filings. Instead, based upon the pattern of conduct shown by Peters, his insight would be whether the judge would consider this motion or leave it for Jack Dunbar's consideration. Accordingly, it seems obvious, based on Peters' prior communications with Eaton's outside counsel, that if Peters intended to bring any "thoughts" about the court's procedure or intentions, it would be through improper *ex parte* contacts. The communication may not have been an obvious indication of *ex parte* contact to an outside reader at the time it was sent, but it was to the sender, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit. On November 15, 2007, DeLaughter rejected Special Master Dunbar's recommendation and ruled in Eaton's favor on this issue. This document shall be produced.

Corresponding Invoice- WC-Q & B 5356- This time record contains the September 14, 2007 time entry of Greg Everts, that does not mention his consultation with Peters regarding

scheduling. The Court finds that this entry goes to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. This document, limited to the September 14, 2007 time entry of "GTE," shall be produced.

WC-Q & B 276-283; Q & B 921-935; WC-Q & B 2569; WC-Q & B 1452- These documents are e-mail communications between Eaton counsel on September 25, 2007. The communications are integral to the ongoing fraudulent effort of Eaton, Schaalman and Peters to have Special Master Jack Dunbar removed, which apparently began as a result of the communications on September 25, 2007. On that date, Special Master Dunbar chastised Schaalman for "abus[ing] the purpose of the ex parte procedure..." The parties were permitted to communicate with Special Master Dunbar *ex parte* regarding a few specific areas, and Dunbar thought that Schaalman had exceeded those boundaries. Schaalman immediately informed the Eaton litigation team of Dunbar's admonishment. Steven Berryman and Brian Gaschler both received Schaalman's e-mail and less than an hour later, Gaschler forwarded the e-mail to Berryman, apparently without any text (or the document is perhaps missing the text). First, any *ex parte* contacts between Schaalman and Dunbar, outside of the permissible areas, are not privileged. Additionally, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document considered in conjunction with WC-Q & B 1228-1229 (as discussed below) "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons)," especially when considering the report received from

Larry Latham in 2008. Accordingly, the Court finds that these documents (in conjunction with WC-Q & B 1228-1229) are responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the beginning of Eaton's, Schaalman's and Peters' successful effort to have Dunbar removed as Special Master. On October 29, 2007, DeLaughter removed Dunbar as Special Master. This document shall be produced.

Corresponding Invoice- WC-Q & B 5304- This billing record represents the entries for the date of September 25, 2007, the date that Schaalman was chastised by Dunbar for his improper *ex parte* contact with Dunbar. Schaalman's time entry reflects "several telephone calls with Ed Peters" about this subject. Accordingly, the Court finds that this time record shall be produced as it evidences the furtherance of the fraud on the court; the entry documents Schaalman's reliance on Peters regarding this subject and the beginning of the successful efforts to have Dunbar replaced. This document shall be produced, limited to the last entry dated 9/25/07 by "MS2."

WC-Q & B 1228-1229- This document is a September 27, 2007 e-mail from Schaalman to Peters, and the Court finds that it represents the most egregious discovery violation perpetrated by Eaton to date. In the e-mail, Schaalman states to Peters: "We need to discuss how either I can win this guy over or how we can convince the judge to appoint a different special master." On

October 29, 2007, Judge DeLaughter issued a *sua sponte* Order removing Jack Dunbar as special master and appointing Larry Latham. The entire Peters inquiry was initiated by Larry Latham's January, 2008 report of Peters' contacts with Latham, the impropriety of which was realized by Latham in January, 2008. In its 2008 discovery responses, Eaton swore that "Eaton had no knowledge of any communications between Ed Peters and Judge DeLaughter concerning the possible removal of Jack Dunbar as Special Master....**Eaton categorically states that it did not instruct, request or suggest that Peters engage in any such communications with Judge DeLaughter or his staff, nor did Peters ever advise anyone at Eaton or its other outside counsel that he intended to discuss, or had in fact discussed, such matters with Judge DeLaughter or his staff.**" *Eaton July 31, 2008 Discovery Responses*, pg. 8 (emphasis added). Further, at Schaalman's deposition, under oath, the following exchange took place: **Q. (By Mr. Perry) Did you have any talk with Ed Peters about it would be nice to get rid of Jack Dunbar? Schaalman A. No.** ***See Schaalman Deposition*, pg. 171, PLDG 1060.015** (emphasis added).

The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons) with Judge DeLaughter concerning...Eaton's desire to remove Jack Dunbar as Special Master," especially when considering the report received from Larry Latham in 2008. Accordingly, the Court finds that this document is overwhelmingly responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order*

granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the document consists of direct evidence of Eaton's, Schaalman's and Peters' successful efforts to have Dunbar removed as Special Master. Had Schaalman been forthright in discovery regarding this document, it may have been believable that Schaalman did not intend Peters to orchestrate Dunbar's removal. However the circumstances of Dunbar's removal, *one month later*, coupled with Schaalman's dishonesty support this Court's finding of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced.

Corresponding Invoice- WC-Q & B 5305; 5359-5361- These billing records represent the entries for the date of September 27, 2007, the date that Schaalman e-mailed Peters detailing his desire to have a new special master appointed, which is clearly furtherance of the fraud on the court. Accordingly, the Court finds the corresponding billing records, limited to the date of September 27, 2007, shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. All time records from this date shall be produced, as they are from one of the most significant dates discussed herein, and the records are necessary to ascertain any other attorneys who were involved in Schaalman's *ex parte* efforts to have Dunbar removed. One entry from that date does document a conference with Schaalman and Ed Peters and Fred Banks. However, this entry clearly does not reference

the September 27, 2007 e-mail, because Schaalman was the sender and Peters was the only recipient.

WC-Q & B 1216-1220- These documents are e-mails forwarded in September, 2007 from Schaalman to Peters, keeping Peters informed of Dunbar's communications with the parties. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that these documents contained "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons) with Judge DeLaughter concerning...Eaton's desire to remove Jack Dunbar as Special Master," especially when considering the information received from Larry Latham in 2008 and in conjunction with Q & B 1228-1229. Accordingly, the Court finds that these documents are responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the document consists of direct evidence of Eaton's, Schaalman's and Peters' successful efforts to have Dunbar removed as Special Master. Had Schaalman been forthright in discovery regarding this document, it may have been believable that Schaalman did not intend Peters to orchestrate Dunbar's removal. However the circumstances of Dunbar's removal, *one month later*, coupled with Schaalman's dishonesty

support this Court's finding of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced.

Corresponding Invoice- WC-Q & B 5305; 5359-5361- These billing records represent the entries for the date of September 27, 2007, the date that Schaalman e-mailed Peters detailing his desire to have a new special master appointed, which is clearly furtherance of the fraud on the court. Accordingly, the Court finds the corresponding billing records, limited to the date of September 27, 2007, shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. All time records from this date shall be produced, as they are from one of the most significant dates discussed herein, and the records are necessary to ascertain any other attorneys who were involved in Schaalman's *ex parte* efforts to have Dunbar removed.

WC-Q & B 2128; 2366; 2344- These documents are September 28, 2007 e-mails from Steven Berryman to various Eaton counsel to inform them that Fred Banks's secretary had "ccd Ed Peters." The Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton intended to shield Peters' involvement from the Frisby parties. This is especially significant as the instructions to shield Peters came during the time which Schaalman was expecting Peters to attempt to get DeLaughter to appoint a new special master. Eaton has made many arguments that the Defendants knew about Peters' involvement, due to an e-mail mistakenly sent by Peters in January, 2007. The Court is not persuaded by that logic, especially since the Defendants had

absolutely no knowledge of Peters' direct contacts with DeLaughter, at Eaton's behest. Even if Eaton's argument was persuasive (that it was not shielding Peters, because the Defendants knew he was involved), the Court finds that these e-mails are directly responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Ed Peters' involvement on behalf of Eaton." The document shall be produced.

Corresponding Invoice- WC-Q & B 5305; 5361-5362- WC-Q & B 5305; 5359-5361- These billing records represent the entries for the date of September 28, 2007, the date that Peters was mistakenly copied on an e-mail by Fred Banks' secretary. The corresponding documents evidence Eaton's continued efforts to hide Peters' involvement. Accordingly, the Court finds the corresponding billing records, limited to the date of September 28, 2007, shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters regarding a fraudulent document that is exchanged. All time records from this date shall be produced.

WC-Q & B 1261- This is a September 30, 2007 e-mail from Schaalman to Peters, wherein Schaalman updates Peters on the snafu of including his name on the September 28, 2007 e-mail. Of note is that Schaalman's e-mails usually conclude with his signature, and this one does not, indicating that text may be missing from the e-mail. The Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton intended to shield Peters' involvement from the Frisby parties. This is especially significant as the attempts to shield Peters came during the time which Schaalman was expecting Peters to attempt to get DeLaughter to appoint a new special master.

Eaton has made many arguments that the Defendants knew about Peters' involvement, due to an e-mail mistakenly sent by Peters in January, 2007. The Court is not persuaded by that logic, especially since the Defendants had absolutely no knowledge of Peters' direct contacts with DeLaughter, at Eaton's behest. Even if Eaton's argument was persuasive (that it was not shielding Peters, because the Defendants knew he was involved), the Court finds that this e-mail is directly responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Ed Peters' involvement on behalf of Eaton." The document shall be produced.

Corresponding Invoice- WC-Q & B 5306- These billing records represent the entries for the date of September 30, 2007, the date that Schaalman e-mailed Peters detailing the mistake in including Peters on the earlier e-mail. Accordingly, the Court finds the corresponding billing records, limited to the date of September 30, 2007, shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to shield its knowledge of the extent of Peters' *ex parte* contacts with DeLaughter.

WC-Q & B 1423- This document is identical to the e-mail discussed above, except that this is an October 1, 2007 e-mail from Schaalman forwarding Peters the September 30, 2007 e-mail. Again, the new forward does not end with Scbaalman's signature, and contains no new text at all, indicating the possibility of missing text from this e-mail. It is illogical for Schaalman to send the exact same e-mail less than thirty minutes later, with no new text or new recipients. This e-mail shall be produced, pursuant to the Court's findings regarding WC-Q & B 1261.

Corresponding Invoice- WC-Q & B 5306- These billing records represent the entries for the date of September 30, 2007, the date that Schaalman e-mailed Peters detailing the mistake in including Peters on the earlier e-mail. Accordingly, the Court finds the corresponding billing records, limited to the date of September 30, 2007, shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to shield its knowledge of the extent of Peters' *ex parte* contacts with DeLaughter.

WC-Q & B 1859-1860- These documents are e-mails forwarded on October 1, 2007 from Schaalman (or his associate) to Peters, keeping Peters informed of Dunbar's communications with the parties. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that these documents contained "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons) with Judge DeLaughter concerning...Eaton's desire to remove Jack Dunbar as Special Master," especially when considering the information received from Larry Latham in 2008 and in conjunction with Q & B 122-1229. Accordingly, the Court finds that these documents are responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the document

consists of direct evidence of Eaton's, Schaalman's and Peters' successful efforts to have Dunbar removed as Special Master. Had Schaalman been forthright in discovery regarding this document, it may have been believable that Schaalman did not intend Peters to orchestrate Dunbar's removal. However the circumstances of Dunbar's removal, *one month later*, coupled with Schaalman's dishonesty support this Court's finding of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced.

Corresponding Invoice- WC-Q & B 5364; 5307- These billing records represent the entries for the dates of October 1-2, 2007, the date that Schaalman e-mailed Peters, again, detailing the mistake in including Peters on the earlier e-mail. Notably, Schaalman conferred with Sharon O'Flaherty on October 1, 2007 and on October 2, 2007, Schaalman, Gaschler and Peters had a conference "regarding case status and strategy." Accordingly, the Court finds the corresponding billing records, limited to the October 1, 2007 entry of "MS2" and the October 2, 2007 entry of "WBG," shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to shield its knowledge of the extent of Peters' *ex parte* contacts with DeLaughter.

WC-Q &B 2646- This is an October 9, 2007 e-mail from Emily Feinstein, outside Eaton counsel, to Ed Peters. Feinstein is forwarding Peters a copy of Jack Dunbar's most recent Report and Recommendation, per Schaalman's request, representing a continuation of Schaalman's efforts to keep Peters informed about his dissatisfaction with Dunbar. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document, considered in conjunction with Q & B 122-1229, contained

"information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons) with Judge DeLaughter concerning...Eaton's desire to remove Jack Dunbar as Special Master," especially when considering the information received from Larry Latham in 2008. Accordingly, the Court finds that these documents are responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the document consists of direct evidence of Eaton's, Schaalman's and Peters' successful efforts to have Dunbar removed as Special Master. Had Schaalman been forthright in discovery regarding this document, it may have been believable that Schaalman did not intend Peters to orchestrate Dunbar's removal. However the circumstances of Dunbar's removal, *one month later*, coupled with Schaalman's dishonesty support this Court's finding of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced.

Corresponding Invoice- WC- Q & B 5366- These billing records represent the entries for the date of October 9, 2007. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to omit any reference to any "consultation" or "communication" with Peters. This document shall be produced, limited to the October 9, 2007 entry of Emily Feinstein as "EF9."

WC-Q & B 2487-2488- This is an October 12, 2007 e-mail from Steven Berryman to Peters, with copies to other Eaton outside counsel. Berryman, per Schaalman's request, is sending Peters a rough draft of the Emergency Motion that Eaton planned to file the next week. Berryman did not send the draft to any other Mississippi counsel, who had vast experience drafting civil briefs. Instead, Berryman, per Schaalman's instruction, only sent the draft to Peters. The communication was likely an obvious indication of *ex parte* contact to the recipients at the time it was sent, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. This document is especially discoverable when considered with WC-Eaton 1320, a document that indicates that Eaton knew that Peters admitted to his attorney that he was sharing briefs with DeLaughter. Eaton contends that Peters did legitimate legal work on its behalf, but it is rather dubious that renowned civil litigation attorneys would take wholesale brief-drafting advice from a career criminal prosecutor, such as Peters, unless Peters had inside knowledge as to what the judge requested for inclusion in the brief. Notably, Eaton filed its "emergency motion" on October 17, 2007, and DeLaughter granted Eaton an emergency stay, as requested, on October 19, 2007. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further,

pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

Corresponding Invoice- WC- Q & B 5370-5371- These billing records represent the entries for the dates of October 11-12, 2007, the date that Berryman e-mailed Peters his "thoughts" on Eaton's proposed brief. Notably, Schaalman conferred with Berryman and Gaschler on October 11, 2007, and Berryman requested Peters' "thoughts" on the complex legal issues the very next day. Accordingly, the Court finds the corresponding billing records, limited to the October 11, 2007 entry of "WBG" and the October 12, 2007 entries of "WBG" and "SB1" shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an implicit effort to shield its knowledge of the extent of Peters' *ex parte* contacts with DeLaughter.

WC-Q & B 1348-1349; WC-Eaton 472-474; Eaton 71-72- These documents consist of the October 16, 2007 e-mail chain regarding Vic Leo's reference to Peters "taking the temperature" of DeLaughter, and was previously produced, in part. The Court finds that in view of the newly produced documents, this document should now be produced in its entirety, as the context therein has direct bearing on the recipients' and the sender's knowledge. Pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter, and it also evidences knowledge of the described communications by Eaton employees. Further, the Court finds that the reference to possible charges by the Defendants, due to Ed Peters involvement is directly

responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Ed Peters' involvement on behalf of Eaton." These documents shall be produced.

Corresponding Invoice- These billing records represent the entries for the dates of October 15-16, 2007, the date that Leo reported to his Eaton supervisors regarding the status of the case. Accordingly, the Court finds the corresponding billing records, limited to the October 1, 2007 entry of "MS2" and the October 2, 2007 entry of "WBG," shall be produced. The Court finds that these entries go to the furtherance of the fraud on the Court, as the totality of the Quarles and Brady time records reviewed by this Court indicate an explicit effort to shield its knowledge of the extent of Peters' *ex parte* contacts with DeLaughter.

WC-Eaton 489- This document is an October 17, 2007 e-mail from Vic Leo, former Vice President and Chief Litigation Counsel at Eaton to Mark McGuire, an Eaton corporate officer and Sharon O'Flaherty, a former senior litigation attorney at Eaton. This e-mail is significant, because it evidences Eaton's continued attempts to use Peters behind the scenes regarding Eaton's attempts to have Judge Lee recuse himself from the Engineers' federal trial. Notably, McGuire denied any knowledge of Peters' actions in this case, but this e-mail, and Leo's "taking the temperature" e-mail one day prior, clearly indicate otherwise. The document provides evidence of Eaton's continued attempts to influence its court proceedings in secret, and the e-mail is directly responsive to Frisby's 2008 Interrogatory No. 3A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. This document shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 870-871- This is a October 19, 2007 e-mail chain from Donna Woida, Schaalman's secretary, to Peters, forwarding to Peters the "orders regarding depositions" per his request. The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. This document is especially discoverable when considered with WC- Eaton 1320, a document that indicates that Eaton knew that Peters admitted to his attorney that he was sharing briefs with DeLaughter. Notably, DeLaughter entered a "discovery order" that same day, and the attachments to the e-mail were not included for this Court's review. Accordingly, the Court

finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 2631; Q & B 2500 These documents are an October 22, 2007 e-mail from Emily Feinstein to Steven Berryman, both outside Eaton counsel. The e-mail warns Berryman to "be careful as there is a cc to Peters." The Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton intended to shield Peters' involvement from the Frisby parties. This is

especially significant as the instructions to shield Peters continued to come during the time which Schaalman was expecting Peters to attempt to get DeLaughter to appoint a new special master. Eaton has made many arguments that the Defendants knew about Peters' involvement, due to an e-mail mistakenly sent by Peters in January, 2007. The Court is not persuaded by that logic, especially since the Defendants had absolutely no knowledge of Peters' direct contacts with DeLaughter, at Eaton's behest. Even if Eaton's argument was persuasive (that it was not shielding Peters, because the Defendants knew he was involved), the Court finds that these e-mails are directly responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Ed Peters' involvement on behalf of Eaton." The document shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 1892-1899- This document is an October 23, 2007 e-mail exchange from Mary Persch, Schaalman's secretary, to Peters, wherein Persch forwarded to Peters a communication

from Jack Dunbar. Dunbar was informing the parties of some health problems he had recently experienced, and Peters responded "I will use it well." The Court finds that this document represents a continuation of the most egregious discovery violation perpetrated by Eaton to date. In a previous e-mail to Peters, Schaalman stated: "We need to discuss how either I can win this guy over or how we can convince the judge to appoint a different special master." On October 29, 2007, Judge DeLaughter issued a *sua sponte* Order removing Jack Dunbar as special master and appointing Larry Latham. The entire Peters inquiry was initiated by Larry Latham's January, 2008 report of Peters' contacts with Latham, the impropriety of which was realized by Latham in January, 2008. In its 2008 discovery responses, Eaton swore that "Eaton had no knowledge of any communications between Ed Peters and Judge DeLaughter concerning the possible removal of Jack Dunbar as Special Master....**Eaton categorically states that it did not instruct, request or suggest that Peters engage in any such communications with Judge DeLaughter or his staff, nor did Peters ever advise anyone at Eaton or its other outside counsel that he intended to discuss, or had in fact discussed, such matters with Judge DeLaughter or his staff.**" *Eaton July 31, 2008 Discovery Responses*, pg. 8 (emphasis added). Further, at Schaalman's deposition, under oath, the following exchange took place: **Q. (By Mr. Perry) Did you have any talk with Ed Peters about it would he nice to get rid of Jack Dunbar? Schaalman A. No.** ***See Schaalman Deposition*, pg. 171, PLDG 1060.015.**

The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons) with Judge DeLaughter concerning...Eaton's desire to remove Jack Dunbar as Special Master," especially when

considering the report received from Larry Latham in 2008. Accordingly, the Court finds that this document is overwhelmingly responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the document consists of direct evidence of Eaton's, Schaalman's and Peters' successful efforts to have Dunbar removed as Special Master. Unlike the previous documents concerning Schaalman's ire with Dunbar, this document evidences explicit instruction and acknowledgement that Schaalman sent this document to give Peters ammunition to have Dunbar removed. DeLaughter's *sua sponte* Order was entered six (6) days after this e-mail. Dunbar's removal and Schaalman's dishonesty support this Court's finding of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records

by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 873- This is a October 24, 2007 e-mail wherein Schaalman forwards to Peters a copy of Dunbar's October 23, 2007 Report and Recommendation. Peters responded "got & faxed it." Dunbar mailed the R & R to the Hinds County circuit court from his Oxford office, and it was not filed until October 25, 2007, which is also presumably when DeLaughter would have received the report. October 24, 2007 is the date when Latham testified that he was first contacted by Peters concerning his interest in becoming the special master. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters (or any other Eaton-Related Corporations/Persons) with Judge DeLaughter concerning...Eaton's desire to remove Jack Dunbar as Special Master," especially when considering the report received from Larry Latham in 2008. Accordingly, the Court finds that this document is overwhelmingly responsive to Frisby's 2008 Interrogatory No. 6A and 12A and 2008 Requests for Production No. 1A and 7A and 10A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit and the document consists of direct evidence of Eaton's, Schaalman's and Peters' successful efforts to have Dunbar removed as Special Master. Unlike the previous documents concerning

Schaalman's ire with Dunbar, this document evidences explicit instruction and acknowledgement that Schaalman sent this document to give Peters additional ammunition to have Dunbar removed. DeLaughter's *sua sponte* Order was entered five (5) days after this e-mail. Dunbar's removal and Schaalman's dishonesty support this Court's finding of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 1878; Q & B 312- This is an October 25, 2007 e-mail from Schaalman to Peters with Eaton's proposed changes to the scheduling order. This is significant, because the e-mail contains the changes that Schaalman "would like to propose to the defendants." However, Eaton was still shielding Peters' involvement at this point, so Peters certainly was not going to communicate the proposal to the Defendants. Accordingly, Schaalman intended to initially involve only Peters in the proposal and arguably Schaalman's concern was whether the proposal would give DeLaughter enough time to decide a dispositive motion prior to trial. The Court

finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit. The documents shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 1398- This is an October 25, 2007 e-mail from to Schaalman to Vic Leo, former chief counsel of Eaton's litigation department. In the e-mail, Schaalman provides an update on the trial date for Leo, and includes his proposal for a new scheduling order. Notably, this exchange occurs *four (4) days prior* to Judge DeLaughter's October 29, 2007 Opinion/Order where DeLaughter removed Dunbar as special master and ordered the parties to submit new proposed scheduling orders. Eaton was already preparing its scheduling order, indicating advance knowledge of the impending ruling. Additionally, the e-mail states that "If we act promptly Ed tells me that the court administrator would switch the August date for a September one." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and most certainly should have been identified, especially by Michael Schaalman, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit. The documents shall be produced.

Corresponding Invoice- WC-Q & B 5371-5386- These billing records represent the entries of the Quarles and Brady firm from October 12, 2007 until October 29, 2007. According to Vic Leo's testimony, he received a report from Schaalman regarding a strategy meeting on or around

October 15, 2007, and he then sent the "take the temperature" e-mail. Notably, from the time period of October 12, 2007 until October 28, 2007, Michael Schaalman did not document any billing entries for his time. This is even more notable when considering Leo consulted with Schaalman during that time and several of the Quarles and Brady time entries documented "meetings" or "conferences" with Schaalman during that time. Accordingly, the lack of records by Schaalman at a time where he was working and involved in furtherance of the fraud on the court is discoverable, and the entire aforementioned billing records shall be produced.

WC-Q & B 1256-1258- This is a November 1-2, 2007 e-mail exchange between Leo and Schaalman that focuses on Eaton's intensive efforts to obtain a desirable trial date. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and most certainly should have been identified by Eaton, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit. The documents shall be produced.

Corresponding Invoice- WC-Q & B 5391-5392- These billing records represent the time entries from November 2, 2007. The Court finds that these November 2, 2007 records, limited to the entry by "SB1" and the entry by "MS2" shall be produced, as the same is evidence of the furtherance of the fraud on the court. During this time period, Eaton's focus was obtaining the most desirable trial date, and these two billing records reflect the involvement of Quarles and Brady attorneys and counsel for Eaton.

WC-Q & B 1236-1239; Q & B 1357-1361- This document is another November 2, 2007 e-mail exchange between Leo and Schaalman regarding Eaton's desired trial date, and the Court finds that this represents one of the most egregious discovery violations perpetrated by Eaton to date. In the exchange, Leo stated "**Why can't the judge just assign Sept 18th? Why do you need Perry's agreement?" Schaalman responded: "I hope you mean August 18 and apparently he feels that he assigned the trial to August 4 over the protest of the defendants and is reluctant to move the date which could draw further protest.**" *Id.* (emphasis added). The only method that Schaalman would have for obtaining information about DeLaughter's reasoning is through improper *ex parte* contact. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document obviously "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and most certainly should have been identified by

Eaton, pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton outside counsel intended for Peters, and possibly in this circumstance, Schaalman, to communicate with DeLaughter for Eaton's benefit. The documents shall be produced.

Corresponding Invoice- WC-Q & B 5391-5392- These billing records represent the time entries from November 2, 2007. The Court finds that these November 2, 2007 records, limited to the entry by "SB1" and the entry by "MS2" shall be produced, as the same is evidence of the furtherance of the fraud on the court. During this time period, Eaton's focus was obtaining the most desirable trial date, and these two billing records reflect the involvement of Quarles and Brady attorneys and counsel for Eaton.

WC-Q & B 2117; Peters 91- This document is a November 5, 2007 e-mail from Brian Gaschler, outside counsel for Eaton, to Peters requesting Peters' thoughts on Eaton's draft reply brief. Gaschler sent Peters the draft for his "thoughts," per Schaalman's request. The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. This document is especially discoverable when considered with WC- Eaton 1320, a document that indicates that Eaton knew that Peters admitted to his attorney that he was sharing

briefs with DeLaughter. Eaton contends that Peters did legitimate legal work on its behalf, but it is rather dubious that very experienced civil litigation attorneys would take extensive brief-drafting advice from a career criminal prosecutor, such as Peters, unless Peters had inside knowledge as to what the judge requested for inclusion in the brief. The e-mail did not include any of Eaton's civilly experienced Mississippi counsel, only Eaton's out of state counsel and Peters. Notably, Eaton filed its reply brief on November 9, 2007, and DeLaughter ruled in Eaton's favor on November 15, 2007. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

Corresponding Invoice- WC-Q & B 5310- This billing record contains the corresponding record documenting Gaschler's e-mail to Peters with Eaton's "briefs related to 'use' issue to E. Peters with summary of relevant issues." This billing record, limited to the November 5, 2007 entry of "WBG" shall be produced, as the same is evidence of Eaton's furtherance of the fraud perpetrated on the Court. Gaschler's involvement is especially significant considering the earlier document which reflected his concern over Peters' role in the case.

WC-Butler 25- This document is the November 8, 2007 handwritten notes of a meeting with "Schaalman, Peters, James Tucker." The document was produced by Butler Snow, and the

author is likely either James Tucker or Bob Anderson, but the author's identity is not certain. At this meeting, Tucker and Anderson (whose client, Mike Allred, was apparently not present) and Schaalman and Peters discussed that "DeLaughter fired Jack Dunbar and replaced him with Larry Latham." The content of the newly-produced documents, specifically WC-Q & B 1228-1229; 1892-1899; 873, clearly shows the role of Peters and Schaalman in getting Dunbar removed. Accordingly, these handwritten notes are evidence of Peters' and Schaalman's discussion of the same, and their furtherance of the fraud on the court. The document also may not be protected by the attorney client or work product privileges, because Butler Snow did not represent Schaalman or Peters. The document is responsive to 2008 Interrogatory 6A and Request for Production 1A. The document shall be produced.

Corresponding Invoice- None.

WC-Peters 92-99- This document is a November 14, 2007 fax from Mary Gaines, DeLaughter's court administrator, sent to Peters at 5:07 p.m. This document may have already been produced to the Frisby Defendants, and should have been, as it is responsive to Frisby's 2008 Interrogatory No. 4A, as evidence that DeLaughter "was aware that Ed Peters had been employed by Eaton." The document is also responsive to 2008 Interrogatory 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very

scenario that M.R.E. 502(d)(1) attempts to protect against. Finally, this document represents a communication with the Court and is not privileged. This document shall be produced.

Corresponding Invoice- WC- Q & B 5394- This billing record contains the November 14, 2007 entries of the Quarles and Brady attorneys. On November 14, 2007, associate Brian Gaschler billed for his time spent to "review order from Judge DeLaughter rejecting special master's October 10, 2007 report and recommendation." Notably, Judge DeLaughter did not enter this Opinion/Order until the next day, November 15, 2007. Accordingly, this billing record shall be produced, limited to all entries on November 14, 2007, as any access to an Opinion/Order before the same was filed is a fraud upon the court. Further, any *ex parte* communication between Eaton and DeLaughter would not be privileged, but if it was privileged, it would clearly constitute an exception pursuant to M.R.E. 502(d)(1).

WC-Eaton 595-596- This document contains the January 15, 2008 handwritten notes of Sharon O'Flaherty, former Eaton senior litigation attorney of her telephone conference with Schaalman. The notes stated: "Ed P. said DeLaughter's opinions may not be respected by Yerger. He's lazy…." Additionally, the notes say "MS seems so corrupt…Do we need to add someone to the team who knows Yerger?" The notes are directly responsive to 2009 Frisby Interrogatory 21A, which requests Eaton to identify and describe all communications between Ed Peters and any Eaton-related person after [December 16, 2007]." In Eaton's discovery responses, Eaton denied any substantive communications with Peters after December 20, 2007. In Eaton's June 27, 2012 supplemented responses, Eaton, for the first time, identified this document as responsive, but gave no explanation due to O'Flaherty's employment termination. The Court finds that this document is expressly responsive to Frisby's 2009 Interrogatory 21A and should have been

produced at that time. The Court further finds that the document contains clear evidence of Eaton's ongoing fraud on the court. The document clearly evidences that either Schaalman or O'Flaherty consulted with Peters after Judge Yerger had begun presiding over the case, one day earlier, on January 14, 2008. This is especially significant, because Schaalman and O'Flaherty denied having any contact with Peters after December 20, 2007. Eaton's counsel would have no reason to ask Peters of his opinion of Yerger prior to January 14, 2008. Therefore, Eaton's counsel, contrary to their sworn deposition testimony, continued to rely on Peters, despite the widespread allegations of his role in allegedly bribing DeLaughter in other civil litigation over which DeLaughter presided. In addition, the document serves as evidence of Eaton's continued fraud upon the Court, as it shows Eaton's pattern of "adding someone to the team who knows" the judge. While that statement, alone, may not be fraudulent, the Court finds that the context of the case *sub judice* makes the same clearly subject to M.R.E. 502(d)(1). The document shall be produced in limited form, including all of Eaton 595 and Eaton 596 from "(3)" until "4 on phone."

Corresponding Invoice- WC-Eaton 5413- This billing record contains a time entry for Schaalman's phone conference with O'Flaherty and then his meeting with the "Q & B Team" that same date. From the face of WC-Eaton 595, it is clear that someone on the Eaton team consulted with Peters regarding his opinion of the newly appointed judge, contrary to earlier deposition testimony. Accordingly, this record, limited to the January 15, 2008 entry by "MS2" shall be produced as furtherance of Eaton's, its counsels' and Peters' fraud upon the court.

3) Eaton Pre-2008 Handwritten Notes of Leo and O'Flaherty [23]

WC-Eaton 1577-1579 - This document is an April 14, 2007 e-mail Vic Leo, which contains an indication that Peters had secretly spoken with DeLaughter about the trial date, which was a highly contested matter, through Leo's statement of "[m]y latest information is that we are on the court's trial schedule for December 3rd. This, however, is not finalized and won't be until the court issues its scheduling order." The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A, 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter and secured Eaton's preferential trial setting, at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

[23] Eaton was ordered to identify the author of the handwritten notes submitted for *in camera* review. The identity of the author, as represented by Eaton, is included in the following analyses. If Eaton represented that the author was unknown, the same is so indicated.

WC-Eaton 714 - This document contains the April 26, 2007 handwritten notes of Sharon O'Flaherty regarding a "T.C" (or telephone conference) with Michael Schaalman, Vic Leo, and Sharon O'Flaherty. The conversation notes reflect "Sept. and Dec. penciled [in]" seemingly a reference to the trial dates. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. As a result, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A, 4A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document reflects direct knowledge of Eaton regarding Peters' contact with the court about the trial date (a heavily disputed issue). This document should be produced in limited form, to include only the Eaton letterhead and "4/26/07 T.C. Schaalman, SLO, VJL" and "Sept & Dec. penciled."

WC-Eaton 757 - This document contains handwritten notes of an unidentified Eaton author on a May 17, 2007 meeting agenda. The notation next to Peters states "[k]nows Judge." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and

especially now, would find that this document represented a "communication of any Eaton Related Corporations/Persons that suggested or insinuated that Ed Peters had any relationship with Judge DeLaughter that would benefit Eaton in this action," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 2A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Moreover, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters' relationship to DeLaughter was of extreme importance to Eaton. This document shall be produced.

WC-Eaton 777-786 - This document contains handwritten notes of Vic Leo on a May 17, 2007 meeting agenda. The notation next to "[s]tay lifted; discovery proceeding" states, "[w]e're applying a lot of pressure on OC and Ed Peters- to get Dec. 3rd trial date." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering WC-Eaton 329, Vic Leo's April 7, 2009 e-mail about Peters' "intentions to speak with the court administrator and the judge Monday about the trial date. This may take some finessing." The trial date was a highly disputed issue. For that reason, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14,

2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated, or was expected to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced, in limited form, to include WC-Eaton 777 and WC-Eaton 778 from the top until "future proceedings" at the end of section I.

WC-Eaton 717-718; 669 - This document contains handwritten notes of Sharon O'Flaherty at a September 5, 2007 Eaton in-house "General Law Staff Meeting" regarding a "Frisby Litigation Update." The notes reference "[f]ormer Pros. Atty of Hinds County - Trial judge's boss." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document represented a "communication of any Eaton Related Corporations/Persons that suggested or insinuated that Ed Peters had any relationship with Judge DeLaughter that would benefit Eaton in this action," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. Given the totality of the circumstances, it is logical to conclude that Peters' status as the "trial judge's boss" would not be a discussion topic at an Eaton meeting involving its in-house officers unless the relationship was being improperly exploited to benefit Eaton. Thus, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 2A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Also, pursuant to M.R.E. 502(d)(1), the

document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters' relationship to DeLaughter was of extreme importance to Eaton. This document shall be produced.

WC-Eaton 606-607 - This document contains the handwritten notes of an unidentified Eaton author dated October 23, [2007]. The notes reference "Terry Thomas and Sharon O'Flaherty" as participants and state "Ed Peters - trial judge is former boss - very close w/ Judge" and "50% of fees plus contingency." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document represented a "communication of any Eaton Related Corporations/Persons that suggested or insinuated that Ed Peters had any relationship with Judge DeLaughter that would benefit Eaton in this action," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. It is logical to conclude that Peters' status as the "trial judge's boss" would not be a discussion topic at an Eaton meeting involving its in-house officers unless the relationship was being improperly exploited to benefit Eaton. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 2A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. In addition, the document is responsive to 2008 Interrogatory 1A regarding the "amount, and nature and method of computation of all compensation...promised to...Ed Peters." Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear

indication that Peters' relationship to DeLaughter was of extreme importance to Eaton. This document shall be produced.

WC-Eaton 624-625 - This document is a November 2, 2007 Order entered in the parallel federal criminal case by Magistrate Judge Linda Anderson. The document contains the handwritten notes of Sharon O'Flaherty, which state "DeLaughter disagrees-Atty-client/work product privilege." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Otherwise, the author would have no basis for knowledge of DeLaughter's opinion regarding a motion pending in federal court. For that reason, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Moreover, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated, or was expected to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

WC-Eaton 640; 653 - This document contains the December 20, 2007 handwritten notes of Sharon O'Flaherty. The document, WC-Eaton 653, appears to be page "2" of the notes, but due to the undated nature of the note, its origination date is not certain, and it references "Schaalman - art. Mentions Eaton" and "Latham is going to make a statement - may be resigning as special

master." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained "information known to Eaton or any Eaton-related Corporations/Persons as to any communication of Ed Peters and Larry Latham, including the communications described by Larry Latham at the hearing on January 27, 2008...." Therefore, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 15A and 2008 Requests for Production No. 1A, 9A and 10A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), these documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton's outside counsel intended for Peters to communicate with DeLaughter for Eaton's benefit. This fraud on the court is directly evidenced in the documents by Eaton's, Schaalman's and Peters' scheme to have Jack Dunbar removed as Special Master. Schaalman would have no reason to expect Special Master Larry Latham to "resign" unless he was privy to Peters' improper contact with Latham prior to Special Master Jack Dunbar's removal, which we now know was done at Schaalman's suggestion. In addition, this document evidences direct knowledge by Eaton of the ongoing scheme to have Peters orchestrate Special Master Jack Dunbar's firing and Larry Latham's appointment as special master. The document is additional evidence of Eaton and its counsels' furtherance of the fraud perpetrated on the court. This document shall be produced, in limited form, including WC-Eaton 640 until "eyes only" and all of WC-Eaton 653.

WC-Eaton 901-905 - This document is a December 16, 2007 e-mail from Schaalman to Vic Leo forwarding a Clarion Ledger article regarding "Scruggs, DeLaughter and Peters." The Court

finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's knowledge of an article that would logically prompt Eaton to initiate an "investigation....after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Accordingly, the Court finds that these document are responsive to Frisby's 2009 Interrogatory 25A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton had knowledge of the accusations of an alleged fraud by Peters and DeLaughter in another case, but the article, apparently, did not prompt Eaton to investigate whether Peters was engaging in similar fraudulent actions in the subject case. This document shall be produced.

WC-Eaton 720 - This document contains undated handwritten notes of Sharon O'Flaherty documenting a "Meeting - T.C. Schaalman." The document references "Jackson in shock about allegations about DeLaughter and Ed Peters." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's knowledge of allegations that would logically prompt Eaton to initiate an "investigation....after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Accordingly, the

Court finds that this document is responsive to Frisby's 2009 Interrogatory 25A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), these documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton had knowledge of the accusations of an alleged fraud by Peters and DeLaughter but this awareness, apparently, did not prompt Eaton to investigate whether Peters was engaging in similar fraudulent actions in the subject case. This document shall be produced.

4) Eaton Post-2008 Handwritten Notes of Leo and O'Flaherty

WC-Eaton 1077-1082 - This document contains the phone records of Vic Leo's desk phone from "12/1/05-12/11/07." The entire record was not produced to the Court, only the records that contained handwritten notes. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Moreover, this document contains a telephone number for Peters, and is responsive to 2008 Request for Production 11A. Furthermore, pursuant to M.R.E. 502(d)(1), these documents evidence the furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton had knowledge of the accusations of an alleged fraud by Peters and

DeLaughter and did undertake some internal investigation efforts, which Eaton was not forthcoming about.

Furthermore, the dates of the phone calls documented by these records are significant. WC-Eaton 16 is discussed above; it is a March 8, 2007 e-mail from Michael Schaalman, outside counsel for Eaton, which contains an indication that Peters had spoken with DeLaughter and knew how he would rule on the Plaintiffs' Motion to Lift Discovery Stay. The phone records reflect that Vic Leo also spoke to Peters for 10.4 minutes on that day, and immediately thereafter, at 4:49 p.m., Vic Leo placed a call to Milwaukee, which indicates that Leo likely reported the nature of his conversation with Peters to someone at Quarles & Brady. The October, 2007 records reflect a phone call between Vic Leo and Schaalman on October 17, 2007, which is the time period during which Vic Leo reported in an e-mail that Peters had "taken DeLaughter's temperature" on an issue. This document, limited to WC-Eaton 1077; 1081-1082, shall be produced.

WC-Eaton 1064-1067 - This document is a February 4, 2008 e-mail from Sharon O'Flaherty to Mark McGuire, Jack Matejka, Vic Leo and Teresa Thomas, all Eaton officers or employees. The e-mail details the document preservation steps required by the Court, and it contains the handwritten notes of Sharon O'Flaherty detailing preservation steps. The Court finds that as reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Accordingly, the Court finds that this document is responsive

to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Additionally, this document contains information that on its face seems to conflict with the affidavits submitted by Eaton on May 17, 2012. Accordingly, the Court finds that, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court." This document shall be produced.

WC-Eaton 1068-1069 - This document is a February 6, 2008 e-mail from Sharon O'Flaherty to Mark McGuire and Vic Leo, all Eaton officers and O'Flaherty's supervisors. The e-mail was sent to inform McGuire of the process underway to preserve documents. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." As a result, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Additionally, this document contains information that on its face seems to conflict with the affidavits submitted by Eaton on May 17, 2012 and earlier testimony regarding Eaton's preservation efforts. Thus, the Court finds that, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court." This document shall be produced.

WC-Eaton 1070-1071 - This document is a February 27, 2008 e-mail from Jeffrey Miller, Eaton Information Technology Security, to Sharon O'Flaherty, reporting that certain preservation efforts were complete. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Additionally, this document contains information that on its face seems to conflict with the affidavits submitted by Eaton on May 17, 2012 and earlier testimony regarding Eaton's preservation efforts. Accordingly, the Court finds that, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court." This document shall be produced.

WC-Eaton 1072-1074 - This document is the August 6, 2008 handwritten notes of Sharon O'Flaherty regarding a meeting with Jeffrey Miller, Eaton Information Technology Security. The notes detail additional preservation efforts of Eaton, and note that "McGuire's PC NOT copies. He [McGuire] had no contact w/ Peters or Judge [Delaughter] - only informed by VJL & SLO. He rec'd all info on case from VJL or SLO." This document directly contradicts the August 22, 2008 sworn affidavit of Vic Leo, detailing Eaton's preservation efforts. *See Leo*

Affidavit, ¶ 8. PLDG. 666. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008[24] or 2009 and especially now, would find that this document on its face contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Thus, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Additionally, this document contains information that seems to conflict with the affidavits submitted by Eaton on May 17, 2012 and earlier testimony regarding Eaton's preservation efforts. Accordingly, the Court finds that, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court." This document shall be produced.

WC-Eaton 1075-1076 - This document is the August 11, 2008 e-mail from Sharon O'Flaherty to Michael Schaalman, Brian Gaschler, and Steven Berryman, detailing Eaton's document preservation efforts. In addition the e-mail was produced with the October 21, 2009 handwritten notes of Sharon O'Flaherty attached, regarding a meeting with Jeffrey Miller, Eaton Information Technology Security. The e-mail and handwritten notes detail additional preservation efforts of Eaton, and reiterate that the only hard drives that were copied were those of Vic Leo, Terry Thomas, and Sharon O'Flaherty. This document directly contradicts the August 22, 2008 sworn affidavit of Vic Leo, detailing Eaton's preservation efforts. *See Leo Affidavit*, ¶ 8. PLDG. 666.

[24] The Court recognizes that this document (and the documents discussed below) is dated beyond the July 31, 2008 discovery responses of Eaton. However, Eaton remained under a duty to supplement its discovery responses, in 2008, 2009, and continuing until today.

The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Therefore, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Moreover, this document contains information that seems to conflict with the affidavits submitted by Eaton on May 17, 2012 and earlier testimony regarding Eaton's preservation efforts. Accordingly, the Court finds that, pursuant to M.R.E. 502(d)(1), the documents evidence the furtherance of Eaton's and Peters' "fraud upon the court." This document shall be produced.

WC-Eaton 1320-1324 - This document contains the handwritten notes of Vic Leo, regarding a January 23, 2009 meeting with "Cynthia" or "CS," presumably Cynthia Stewart, Ed Peters' attorney. The notes acknowledge that the "302 report" contained a "couple ¶s about Eaton" and "Eaton mentioned 'in passing' – describes the case – Ed [Peters] has *ex parte* communications- 'read the briefs!!!" "Durkin[25]-confirms DeL [DeLaughter] will say he made decision to remove JD [Jack Dunbar]- told EP [Ed Peters]; asked EP [Ed Peters] for rec." (emphasis added). The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained information that was responsive to several discovery requests propounded by Frisby. First, the document contained evidence of Eaton's "investigation...after the publication of media reports identifying

[25] Durkin was Judge DeLaughter's attorney.

the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Therefore, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Notably, in Eaton's 2008 response to Interrogatory 5A, stated that "Mr. Sneed also spoke with Ed Peters' attorney, Cynthia Stewart, and requested permission to interview Ed Peters on behalf of Eaton, which request was declined." According to this document, Eaton representatives also spoke to Cynthia Stewart and learned information responsive to Frisby's discovery requests. The document also contains information responsive to Interrogatory 6A, 10A, 13A, 18A and Request for Production 7A and 13A. This document shall be produced.

The following documents were included in Eaton's post-2008 production, but are undated. If the context of the document indicates a likely date, the Court's findings will make note of the likely time period:

WC-Eaton 1185-1188 - This document is an undated set of handwritten notes by Vic Leo. The notes reference findings made in this Court's December 22, 2010 Order of Dismissal, so the notes were made some time after the order was issued. The notes mention that "Eaton had no knowledge of any improper contacts betw/ EP [Peters] and BD [Delaughter] during EP's representation of Eaton-learned about some long after." Eaton has maintained throughout the litigation that it had no knowledge of any improper contacts between Peters and DeLaughter, and that any contacts regarding scheduling, which it knew about, were not improper. The Court finds

that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained information that was responsive to several discovery requests propounded by Frisby. First, the document contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." As a result, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. In addition, the document, on its face, contained evidence that was responsive to 2008 Interrogatory 9A, which requested "facts or information that Eaton...is aware of that indicates or suggests that Peters...had any communications with Bobby DeLaughter." This document shall be produced in limited form, to include the top of WC-Eaton 1185 "Yerger Order" and WC-Eaton 1188, beginning with (4) to the end of the page.

WC-Eaton 955 - This document is an undated set of handwritten notes by Sharon O'Flaherty. The notes reference findings made in this Court's December 22, 2010 Order of Dismissal, so the notes were made some time after the order was issued. The notes mention that Eaton should "delete" its reference that the contacts between Peters and DeLaughter were unauthorized and unknown to Eaton and its legal team "until long after Peters' representation of Eaton was terminated." The note states "[w]e've made no public concession on whether [such] contacts were inappropriate." Eaton has maintained throughout the litigation that it had no knowledge of any improper contacts between Peters and DeLaughter, and that any contacts regarding

scheduling, which Eaton knew about, were not improper. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained information that was responsive to several discovery requests propounded by Frisby. First, the document contained evidence of Eaton's "investigation...after the publication of media reports identifying the federal subpoena issued to The Langston Law Firm seeking documents reflecting payments made to Ed Peters regarding a matter before Judge DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2009 Interrogatory 22A and 2008 Interrogatory No. 5A and 2008 Requests for Production No. 1A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Moreover, the document, on its face, contained evidence that was responsive to 2008 Interrogatory 9A, which requested "facts or information that Eaton...is aware of that indicates or suggests that Peters...had any communications with Bobby DeLaughter." This document shall be produced, pursuant to M.R.E. 502(d)(1), in limited form to include paragraphs 28-31 and all handwritten notes contained on the document.

WC-Eaton 964 - This document contains the undated handwritten notes of Sharon O'Flaherty, wherein she states that "in 302s- no info[rmation] on Eaton asking Peters to do anything improper. Ask Bob Norman (Steve B & Bob Anderson see him)." The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained information that was responsive to Interrogatory 18A, requesting Eaton to identify "any statements or other documents that Eaton...has provided to any governmental agency" related to any communications of Peters and

DeLaughter. This document evidences Eaton's continued effort to cover up Peters' improprieties, and it shall be produced, pursuant to M.R.E. 502(d)(1), in limited form, to include the paragraph beginning "In 302's" and ending with "see him."

WC-Eaton 923 - This document contains the undated handwritten of Sharon O'Flaherty, but the context of the document referenced Larry Latham's resignation, so the date is post-January 2008. In reference to the beginning of the Peters inquiry, the notes state "He'll [Judge Yerger] determine if Peters is sanctioned, remains on case, etc. at conclusion of investigation." Eaton has maintained that Peters resigned from the case at a breakfast meeting with Michael Schaalman on December 20, 2006. Accordingly, this document, reflecting the possibility of Peters "remain[ing] on the case" at some time beyond January, 2008, is directly responsive to 2008 Interrogatories 4A and 19A and Request for Production 1A. Furthermore, this document contradicts Eaton's 2008 and 2009 discovery responses and shall be produced, pursuant to M.R.E. 502(d)(1), in limited form, beginning with "Latham was very concerned..." through the end of the document.

WC-Eaton 926 - This document contains the undated handwritten notes of Sharon O'Flaherty; the context of the document indicates that it was written in early 2008. In the document, O'Flaherty states "Peters work w/ Eaton-Dec 20 '07 stopped working." This document is responsive to 2009 Frisby Interrogatory 21A, which requests Eaton to identify and describe all communications between Ed Peters and any Eaton-related person after [December 16, 2007]," especially in view of an earlier-discussed document, WC-Eaton 595. In Eaton's discovery responses, Eaton denied any substantive communications with Peters after December 20, 2007.

In Eaton's June 27, 2012 supplemented responses, Eaton, for the first time, identified WC-Eaton 595 document as responsive, but gave no explanation due to O'Flaherty's employment termination. The Court finds that this document is expressly responsive to Frisby's 2009 Interrogatory 21A and should have been produced at that time. The Court further finds that the document contains clear evidence of Eaton's ongoing fraud on the court. WC-Eaton 595 clearly evidences that either Michael Schaalman or O'Flaherty consulted with Peters after Judge Yerger had begun presiding over the case, one day earlier, on January 14, 2008. This document, WC-Eaton 926, clearly indicates efforts by Eaton and O'Flaherty to conceal the fact that Eaton was still relying on Peters beyond December, 2007. Since WC-Eaton 926 evidences Eaton's continued effort to cover up Peters' improprieties, it shall be produced, pursuant to M.R.E. 502(d)(1), in limited form, beginning with "(3) and ending with "stopped working."

5) Belatedly Produced Phelps Dunbar Documents

WC-Phelps 2817 - This is a January 19, 2007 e-mail from Michael Schaalman, outside counsel for Eaton at Quarles & Brady, to the Eaton team, including Vic Leo and Sharon O'Flaherty. In the e-mail, Schaalman stated that "before [Ed] left he indicated that a motion to lift the stay would be appropriate." While the communication may not have been an obvious indication of Schaalman's knowledge of Peters' *ex parte* contact at the time it was sent, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's

July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter and had knowledge about a ruling before it was entered. Earlier documents discussed herein, such as WC-Eaton 16, contain evidence that Peters was privy to inside knowledge from DeLaughter regarding Eaton's efforts to lift the discovery stay, as early as January 22, 2007, and his inside knowledge was correct. Eaton filed its Motion to Lift Discovery Stay on March 1, 2007 and, as Peters predicted, DeLaughter "wait[ed] until his order" on the sanctions issue and granted the Motion on April 6, 2007. This document shall be produced.

WC-Phelps 2419-2421 - This is a January 27, 2007 e-mail exchange between Fred Banks, Mississippi counsel for Eaton, and Michael Schaalman, outside Eaton counsel at Quarles & Brady. Banks' e-mail referenced his assistant's mistake in including Peters on a service e-mail that went to all counsel of record. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2009 and especially now, would find that this document on its face contained information that was responsive to a 2009 discovery request propounded by Frisby. The Court finds that this e-mail contains "discussions regarding the scope of email distribution lists with respect to Ed Peters," and the Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication of Eaton's ongoing efforts to shield Peters' involvement from the Frisby parties. The Court finds that this e-mail is directly responsive to Frisby's 2009 Request for Production 19A, and should have been produced for review, at that time. The document shall be produced.

WC-Phelps 2926 - This is a January 28, 2007 e-mail from Fred Banks, Mississippi counsel for Eaton, to Peters, which referenced that Peters was "inadvertently shown as a recipient..." on a previous e-mail by Banks' assistant. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2009 and especially now, would find that this document on its face contained information that was responsive to a 2009 discovery request propounded by Frisby. The Court finds that this e-mail contains "discussions regarding the scope of email distribution lists with respect to Ed Peters," and the Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication of Eaton's ongoing efforts to shield Peters' involvement from the Frisby parties. The Court finds that this e-mail is directly responsive to Frisby's 2009 Request for Production 19A, and should have been produced for review, at that time. The document shall be produced.

WC-Phelps 3142 - This document is an additional copy of the March 15, 2007 e-mail from Peters to the Eaton litigation team, (discussed earlier as WC- Q & B 191) wherein Peters referenced his inside knowledge of DeLaughter's actions and stated "it's about the best I can do." The Court re-adopts its findings as stated in its discussion of WC-Q & B 191, and restates the same. The Court further finds that this document should have been an obvious indication of *ex parte* contact at the time it was sent, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is

responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter stating, "I don't think he [DeLaughter] has ever faced this before" and "[h]ope this helps-it's about the best I can do." It is unusual that Peters (an attorney who did not have much civil experience) would know whether DeLaughter had faced a certain civil litigation issue as a judge unless Peters had talked with DeLaughter about it. This is further supported by Peters' statement "it's about the best I can do." This document, evidencing a forward from Fred Banks, Mississippi counsel for Eaton, to Justin Matheny, an associate at Banks' firm, shall be produced.

WC-Phelps 3143 - This document is a March 15, 2007 e-mail from Peters to Fred Banks and Michael Schaalman. In the e-mail, Peters advises that Eaton's response should be "short & sweet & leaving it to the Jdg, without further action, before they raise the 5th amend issue." While the communication may not have been an obvious indication of Peters' *ex parte* contact at the time it was sent, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." The impropriety of Peters' knowledge is especially clear when considering the other documents sent by Peters discussing his predictions of DeLaughter's ruling. On March 23, 2007, Peters and Vic Leo exchanged e-mails, wherein Leo complained about the stay, and Peters reported that he was "REALLY pushing to get the ox out of the ditch" and "mgmt...will

be VERY pleased with you." *See April 17, 2012 Newly Produced Documents*. Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Moreover, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter and had knowledge about a ruling before it was entered. Peters was privy to inside knowledge as early as January 22, 2007, and his inside knowledge was correct. Eaton filed its Motion to Lift Discovery Stay on March 1, 2007 and, as Peters predicted, DeLaughter "wait[ed] until his order" on the sanctions issue and granted the Motion on April 6, 2007. This document shall be produced.

WC-Phelps 3194 - This document is a March 20, 2007 e-mail from Fred Banks to Justin Matheny. Banks requests Matheny to "put together a memo...to give Ed some comfort" regarding a motion to compel in the context of the Defendants' Motion for Sanctions. While the communication may not have been an obvious indication of Peters' *ex parte* contact at the time it was sent, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Thus, pursuant to M.R.E. 502(d)(1), the document

evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter and had knowledge about a ruling before it was entered. The timing of this e-mail is important. On March 20, 2007, the Motion to Dismiss had been fully briefed and was pending before Judge DeLaughter for a ruling. Accordingly, it makes little sense that Peters would need "some comfort" about a legal issue that was pending before the judge, unless Peters was discussing the judge's concerns *ex parte*. This document shall be produced

WC-Phelps 3221 - This is a March 21, 2007 e-mail exchange between Vic Leo and Fred Banks. Leo was inquiring whether there was "any word from the Court." Then, in reference to fee agreements, Leo stated "I guess the other item I was waiting on is the ruling from the court." Peters continued to advise Leo of his inside information from the judge. *See April 17, 2012 Newly Produced Documents*. While the communication may not have been an obvious indication of Peters' *ex parte* contact at the time it was sent, the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Therefore, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Furthermore, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter and had knowledge about a ruling before it was entered and was continually

advising Eaton as to the expected timing of the ruling. Peters was privy to accurate inside knowledge as early as January 22, 2007. Eaton filed its Motion to Lift Discovery Stay on March 1, 2007 and, as Peters accurately predicted, DeLaughter "wait[ed] until his order" on the sanctions issue and granted the Motion on April 6, 2007. This document shall be produced.

WC-Phelps 3423-3425 - This is an April 11, 2007 e-mail exchange between Fred Banks and Michael Schaalman, recognizing "the client's insistence for a December 3 trial date." The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering WC-Eaton 329, a document dated April 7, 2007, which contained Vic Leo's earlier e-mail about Peters' "intentions to speak with the court administrator and the judge Monday about the trial date. This may take some finessing." The trial date was a highly disputed issue. As a result, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated, or was expected to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E. 502(d)(1) attempts to protect against. This document shall be produced.

WC-Phelps 3466 - This document is an e-mail forwarded from Michael Schaalman to Fred Banks and Reuben Anderson, sending the earlier discussed document, WC-Q & B 2873. This document is the April 12, 2007 e-mail, which Eaton recently conceded may be responsive to prior discovery requests, from Emily Feinstein, Eaton's outside counsel to other Eaton team members.. The Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Eaton intended to shield Peters' involvement from the Frisby parties. This is especially significant as the instructions to shield Peters came six (6) days after DeLaughter's April 6, 2007 Opinion was issued, containing decisions accurately "predicted" by Peters. Eaton has made many arguments that Frisby knew about Peters' involvement, due to an e-mail mistakenly send by Peters in January, 2007. The Court is not persuaded by that logic, especially since Frisby had absolutely no knowledge of Peters' direct contacts with DeLaughter, at Eaton's behest. Even if Eaton's argument was persuasive (that it was not shielding Peters, because the Frisby knew that Peters was involved), the Court finds that the clear language of this e-mail is directly responsive to Frisby's 2009 Request for Production 19A, which requests "all documents relating to efforts to shield Ed Peters' involvement on behalf of Eaton." The document shall be produced.

WC-Phelps2341-2342 - This document is a May 3, 2007 e-mail from Ed Peters to Michael Schaalman, Fred Banks and Anderson. In the e-mail, Peters, discussing the Defendants' [Frisby] Motion for Reconsideration of DeLaughter's April 6, 2007 opinion, stated that "We are EXTREMELY, EXTRAORDINARILY, etc, etc, FORTUNATE to have a Judge who can, and does, read and analyze everything the ENEMY 'chunks' at us (through him).., pretty much without our help, which he did a fine job of (with your help) on this topic...." The Court finds

that this document should have been an obvious indication of *ex parte* contact at the time it was sent, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter stating "did a fine job of (with your help)" and "I couldn't be more pleased and suspect each of you feel the same." This document shall be produced.

WC-Phelps 4443 - This is a September 28, 2007 e-mail from Fred Banks to his assistant, conveying his dismay that Peters was included on another service list that went to Frisby. The Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document on its face contained information that was responsive to a 2009 discovery request propounded by Frisby. The Court finds that this e-mail contains "discussions regarding the scope of email distribution lists with respect to Ed Peters," and the Court finds that pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication of Eaton's ongoing efforts to shield Peters' involvement from the Frisby parties. The Court finds that this

e-mail is directly responsive to Frisby's 2009 Request for Production 19A, and should have been produced for review, at that time. The document shall be produced.

6) Peters Documents

DGN-Peters 704-713- This is the April 16, 2007 *Defendants' Motion to Stay Civil Proceeding Pending Resolution of Criminal Proceedings*, which contains handwritten notations of Peters. Peters notes "Ct needs statement under oath that this is their intention at this time." The Court finds that this document should have been an obvious indication of *ex parte* contact at the time it was produced by Peters, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No. 3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter stating "the Court needs...." Logically, Peters would have no knowledge of what "the Court needs" unless he was informed through improper, *ex parte* contacts. Peters' only contact with the court was through *ex parte* contact, as he was not an attorney of record in this matter. This document shall be produced.

DGN-Peters 881-900- This document is a draft of Eaton's Proposed Findings of Fact in Response to Defendants' Motion to Stay All Proceedings and Plaintiffs' Proposed Conclusions

of Law, which were never filed. An earlier discussed document, WC- Q & B 1117-1118, referenced Eaton's work on the proposed findings, but Eaton decided to refrain from filing the documents, because Peters advised that the proposal "wld only lead to more fuel for interloc appeal by any of their proposals which might be rejected." *See WC- Q& B 117-118*, May 1, 2007 e-mail. Notably, Judge DeLaughter entered his Order Denying the Defendants' Motion to Stay, which was shorter, but contained very similar content as Eaton's proposed findings of fact. *See* PLDG. 291. The communication may not have been an obvious indication of *ex parte* contact at the time it was sent, but the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter," especially when considering the earlier and ongoing clear evidence that Peters was engaged in improper *ex parte* contacts with DeLaughter, which were giving Eaton a clear advantage. This document is especially discoverable when considered with WC-EATON 1320, a document that indicates that Eaton knew that Peters admitted to his attorney that he was sharing briefs with DeLaughter. This document shall be produced.

DGN-Peters 1166; 1770- This document contains undated handwritten notes of Peters, which contain a reference to "even Jdg confused." The Court finds that this document should have been an obvious indication of *ex parte* contact at the time it was produced by Peters, and the Court finds that a reasonable person or attorney knowing all of the circumstances, in 2008 or 2009 and especially now, would find that this document "indicates or suggests that Peters or any Eaton-Related Corporations/Persons had any communications with Bobby DeLaughter." Accordingly, the Court finds that this document is responsive to Frisby's 2008 Interrogatory No.

3A and 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated with DeLaughter stating "even Jdg confused" Logically, Peters would have no knowledge of what "confused" the Judge unless he was informed through improper, *ex parte* contacts. Peters' only contact with the court was through *ex parte* contact, as he was not an attorney of record in this matter. This document shall be produced.

DGN-Peters 1276-1278- This document is a June 7, 2007 fax from Peters to Mary Gaines, DeLaughter's court administrator. This document was produced to Frisby in 2009, but as the document is not privileged, it shall be produced.

DGN-Peters 3342-3353- This document is a June 21, 2007 fax from Mary Gaines, DeLaughter's court administrator, sent to Peters at 4:26 p.m. This document may have already been produced to the Frisby Defendants, and should have been, as it is responsive to Frisby's 2008 Interrogatory No. 4A, as evidence that DeLaughter "was aware that Ed Peters had been employed by Eaton." The document is also responsive to 2008 Interrogatory 9A and 2008 Requests for Production No. 1A and 7A, and should have been identified pursuant to this Court's July 14, 2008 *Order* granting, in pertinent part, Frisby's Motion to Compel. *See* M.R.C.P. 37. Further, pursuant to M.R.E. 502(d)(1), the document evidences furtherance of Eaton's and Peters' "fraud upon the court" through a clear indication that Peters communicated and expected to continue to successfully communicate with DeLaughter at Eaton's clear behest-the very scenario that M.R.E.

502(d)(1) attempts to protect against. Finally, this document represents a communication with the Court and is not privileged. This document shall be produced.

B. Newly Produced Documents that Contain Further Evidence of the ongoing "Fraud Upon the Court" and cover up of the same

The Court finds that all documents found to be responsive to Frisby's previous discovery requests and ordered to be produced are, pursuant to M.R.E. 502(d)(1), evidence of the furtherance of the fraud perpetrated by Eaton and Eaton's counsel on the Court, and shall be produced for that reason. The documents are discussed, heretofore, at length as documents that were responsive to Frisby's 2008 and 2009 discovery requests. The Court finds that these documents should have been produced as responsive to those requests, and the Court also finds that even if the documents were not responsive to previous discovery requests, the documents evidence Eaton's continued fraud on the Court.

WC-Phelps 628- This document is an October 16, 2007 e-mail from Vic Leo to Banks, Peters, Schaalman and O'Flaherty, wherein Leo conveys how "appalled 1 and General Counsel [McGuire] are about Judge Lee's recent behavior." This document directly contradicts Leo's sworn deposition testimony on this subject, thereby evidencing the furtherance of Eaton's fraud on the court, pursuant to M.R.E. 502(d)(1). At Leo's October 27, 2009 deposition, Frisby Attorney Alan Perry asked Leo "Was Mr. McGuire concerned [about Judge Lee]? Leo: A. "My concern was conveyed to Mr. McGuire." Perry: Q. "Did he [McGuire] share it?" Leo: A. "Not that I know of." This document sball be produced.

WC-Eaton 1044- This is an undated page from the February, 2008 document preservation order, containing the handwritten notes of an unknown Eaton author. The notes state "We had no contact w/ Peters or Judge D. or emails related to that- In Dec. Judge stepped down." The documents discussed throughout this opinion, especially WC-Eaton 595, indicate that Eaton continued to have contact with Peters, which conflicts with Eaton's position that it did not contact Peters after December 20, 2007. Accordingly, the Court finds that the notations by Eaton in this document are not based in fact, and in furtherance of Eaton's cover up of its fraudulent actions. Accordingly, this document shall be produced, pursuant to M.R.E. 502(d)(1).

C. Documents Requiring Additional Information

1) Documents Initially Produced by Eaton on May 17, 2012 and May 22, 2012

WC-Peters 19-20- This is an April 17, 2007 e-mail of a brief outline, which contains extensive handwritten notes. The document was found in Peters' files, but the author of the handwritten notes is not certain. The earlier-discussed document WC-Eaton 1320 contains an acknowledgment by Peters that he shared Eaton's briefs with DeLaughter. Additional information is needed regarding the author of this document, and if the notes belong to Peters, additional information is needed as to whether he consulted DeLaughter regarding the notations.

2) Invoices Submitted by Eaton on May 31, 2012 and June 12, 2012:

None requiring additional information, at this time.

3) Eaton Pre-2008 Handwritten Notes of Leo and O'Flaherty

WC-Eaton 865- This is a document that contains the January 1, 2008 notation that Vic Leo had a file entitled "Frisby Litigation" which was "Archived on 1/27/08." Eaton produced a report from Latham and Watkins, a firm hired by Eaton to complete an internal investigation relating to discovery in this case. On May 17, 2012, the Latham and Watkins report was provided to the Court, which mentions an "archived folder" belonging to Vic Leo. *See L & W Report*, pg. 7, fn. 5. However, the report represents that this archived folder was actually unrelated to this case, despite its label, and that it was deleted in April, 2011. This document may indicate otherwise, and more detail is needed concerning when and how the folder came to be deleted.

4) Eaton Post-2008 Handwritten Notes of Leo and O'Flaherty

WC-Eaton 1305-1306- This is a January 23, 2009 list of "pending issues" written by an unknown Eaton author. The document contains a handwritten note that states "Issues that linger- EP affidavit." More detail is needed regarding whether an affidavit from Ed Peters was received.

WC-Eaton 1277- This document is the May 4, 2009 "Approved Fees and Expenses" paid by Eaton regarding "Frisby Miscellaneous." The document details that the law firm of Latham & Watkins was paid $79,330. Notably, in the May 17, 2012 sworn Affidavit of Sandy Cutler, Eaton's CEO, Mr. Cutler states that "Mr. Brandt [managing partner of Latham & Watkins' New York office] was retained by Eaton in 2011...." These documents seem contradictory, and more information is needed.

WC-Eaton 1047- This document is a copy of page three (3) of Frisby's 2008 discovery requests, which contains the undated handwritten notes of an unknown Eaton author. The notes

reference "Latham & Watkins" as being responsive to Interrogatory 5A. In the redacted portion of Eaton's answer to Interrogatory 5A, Eaton did state that "in February, 2008 Eaton retained outside counsel to review whether Eaton personnel had engaged in conduct intended to generate improper conduct by Peters." In the May 17, 2012 sworn Affidavit of Sandy Cutler, Eaton's CEO, Mr. Cutler states that "Mr. Brandt [managing partner of Latham & Watkins' New York office] was retained by Eaton in 2011…." These documents seem contradictory, and more information is needed.

5) Belatedly Produced Phelps Dunbar Documents

WC-Phelps 3958- This document is a May 21, 2007 e-mail regarding an Eaton team conference call. The e-mail shows a copy going to Ed Peters' business fax at Phelps Dunbar. On February 2, 2008, this Court entered an *Agreed Order to Preserve Evidence*, which contained preservation instructions to include "Ed Peters and any law firm with which [he is] associated" and requiring Eaton to provide notice to any such firm. On February 5, 2007, Eaton filed its *Certificate of Delivery*, which did not include any business fax number for Ed Peters at the Phelps Dunbar firm. This non-privileged portions of this document (the heading until the end of the subject line) shall be produced, and more information is needed.

WC-Phelps 4495- This document is a December 6, 2007 e-mail from Mary Gaines, DeLaughter's court administrator, to Fred Banks' secretary, Felicia Wilson. Mary Gaines wrote that "DeLaughter want to me [sic] e-mail all the parties involved a memo that he did." This e-

mail is not privileged, and shall be produced. Further, more information is needed regarding whether a memo was ever sent and to whom.

6) Peters Documents

DGN-Peters 1- This document is an April 9, 2008 letter from Fred Banks to Richard Owen, Esq. at Latham & Watkins in New York, NY, forwarding all Peters documents. On June 30, 2009, Special Master Dogan issued a Report and Recommendation regarding Eaton's 2008 discovery responses. At that time, Eaton served its discovery responses with four responses in redacted form. After Frisby objected, Special Master Dogan recommended that two interrogatory responses should remain redacted, 2008 Interrogatory 5A and 9A. On September 29, 2008, this Court entered an Order accepting the Special Master's recommendation, and the discovery responses were re-served by Eaton accordingly. On May 17, 2012, Eaton employees filed sworn affidavits detailing the internal investigation performed by Latham & Watkins of New York. In the May 17, 2012 sworn Affidavit of Sandy Cutler, Eaton's CEO, Mr. Cutler states that "Mr. Brandt [managing partner of Latham & Watkins' New York office] was retained by Eaton in 2011...." The Court finds that the redacted portion of Eaton's 2008 Interrogatory 5A response has been made relevant as a result of Eaton's May 17, 2012 affidavits. Accordingly, Eaton shall provide an unredacted response to 2008 Interrogatory 5A to Frisby. Further, the 2008 and 2012 documents regarding the investigation by Latham & Watkins seem contradictory, and more information is needed regarding DGN-Peters 1.

DGN-Peters 13- This is a document that represents one page of the list of documents received from Ed Peters' office pursuant to this Court's preservation order. One listing states

"Memorandum Opinion dated August 1, 2008." The Court finds that the "2008" document referenced is relevant, and should be identified and produced to Frisby and to the Court. A Memorandum Opinion is not privileged, and it is unknown why Peters would have any document dated August 1, 2008 in his Eaton files.

DGN-Peters 543-574- This document is an unsigned copy of Judge DeLaughter's April 6, 2007 Memorandum Opinion that appeared in Peters' files. If Peters had a copy of an unsigned opinion, the same could have only come from DeLaughter. The Court finds that further information is needed as to whether the opinion was distributed to all parties in an unsigned posture. The Court further finds that this document is not privileged and shall be produced.

DGN-Peters 1229; 1231-1232- This document was printed on April 5, 2007 (one day prior to DeLaughter's "anticipated" April 6, 2007 ruling) and was produced from Peters' Eaton v. Frisby files. The documents contain references to tax strategies to manage a "concentrated stock position" and an article advising how "to Trim Your Exposure to Taxes on Distributions of Company Stock." In 2008, Frisby propounded Interrogatory 1A requesting Eaton to "fully describe the amount, and nature and method of computation of all compensation...paid to, promised to, provided to, or discussed with Ed Peters..." The Court finds that these documents, dated April 5, 2007 (at a time when Eaton was attempting to work out a fee agreement with Peters), and preserved in Peters' Eaton file may indicate a method of payment or consideration for Peters in this case. The documents, which are not privileged, shall be produced, and Eaton shall provide definitive information regarding any relationship between corporate stock and Ed Peters.

DGN-Peters 1675-1682- This is an undated draft version of Eaton's proposed ruling/findings and conclusions for DeLaughter on the Motion for Sanctions and the Motion to Partially Lift Stay. On April 6, 2007, DeLaughter ruled, exactly as laid out in this draft. While DeLaughter used different language, he provided the relief as set forth by Eaton in this draft. Notably, the relief in this draft was markedly different from the relief requested by Eaton in its briefs on these issues. The Court finds that this document, if it was not filed with the Court, should have been an obvious indication of *ex parte* contact at the time DeLaughter ruled. The Court notes that DeLaughter had a standing "Rule 78 Order" permitting parties to submit proposed findings and conclusions. The Court needs additional information as to whether this document was submitted, and if so, when it was submitted.

CONCLUSION

"Discovery is not to be treated as a game of hide and seek. It should be a forthright effort to expedite litigation...." *City of Jackson v. Rhaly*, 2009-CT-00350-SCT, 2012 WL 1432549 (Miss. Apr. 26, 2012) (citing *Bell v. Auto. Club of Michigan*, 80 F.R.D. 228, 231 (E.D. Mich. 1978)). "Parties like witnesses are required to state the truth, the whole truth and nothing but the truth in answering written interrogatories." *Pierce v. Heritage Props., Inc.*, 688 So.2d 1385, 1389 (Miss.1997) (internal citations omitted).

The documents, as discussed at length herein, clearly evidence Eaton's continued fraud upon this Court, through both its initial misdeeds and the ongoing purposeful cover up of those misdeeds. While Eaton has recently begun to separate itself from several of its attorneys whose improper conduct is clear from the documents, the fact remains that the actions of those attorneys

were at the behest and for the benefit of Eaton. Eaton terminated its in-house counsel, Vic Leo and Sharon O'Flaherty, and Quarles and Brady, LLC has moved to withdraw from this litigation, as its attorneys, Schaalman, Feinstein, Berryman, and Gaschler were apparently terminated by Eaton as well. It seems likely that Eaton will attempt to blame these blatant misdeeds on its now fired attorneys. However, the Court will not accept any such "finger pointing" at such a late juncture. The documents clearly evidence a broad fraudulent scheme and an extensive cover up of the past and ongoing fraud, as required by M.R.E. 502(d)(1) for the production of the documents ordered herein. No matter who initiated this fraudulent scheme, Eaton or its counsel, the bottom line is that both Eaton and its counsel participated. "[N]othing suggests that the crime-fraud exception applies only if the client initiates the conversation." *In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir. 2006).

In sum, the impartial search for the truth is the essential purpose of civil litigation. "In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law." *F.W. Woolworth Co. v. Wilson*, 74 F.2d 439, 443 (5th Cir. 1934). "The truth pronounced by Justinian more than a thousand years ago that, 'Impartiality is the life of justice,' is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and [a]ffect the measure of its judgments." *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976). This Court has found clear and convincing evidence that Eaton's improper influence over then-Judge DeLaughter resulted in DeLaughter's bias and partiality as he made rulings evidencing such in Eaton's favor. *Id.* As a result of Eaton's patent assault on Justinian's truth, the court is compelled to issue its findings and conclusions herein.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED that, pursuant to M.R.E. 502(d)(1), Eaton shall produce the documents as analyzed herein, within twenty-one (21) days of this Order. Eaton shall also provide the Court with a copy of the documents produced to Frisby, pursuant to this Court's directives herein. As stated, all recommendations of the Special Master, in the June 4, 2012 Report & Recommendation, which are consistent with the rulings herein are hereby adopted and all recommendations that are inconsistent with the rulings herein are overruled. All objections by the parties not specifically addressed are hereby overruled.

IT IS, FURTHER, HEREBY ORDERED AND ADJUDGED that the Court has ordered Eaton to provide additional information regarding various documents. Additional information, as specified herein, regarding the following documents shall be provided to the Court, *in camera*, within ten (10) days: WC- Peters 19-20; DGN- Peters 1229; 1231-32. Additional information, as specified herein, regarding the following documents shall be provided to the Court and all parties within ten (10) days: WC-Eaton 865; WC-Eaton 1305-1306; WC-Eaton 1277; WC-Eaton 1047; WC-Phelps 3958; WC-Phelps 4495; DGN-Peters 1; DGN-Peters 13; DGN-Peters 543-574; DGN-Peters 1679-1682.

SO ORDERED AND ADJUDGED this 19th day of September, 2012.

JEFF WEILL, SR.
HINDS COUNTY CIRCUIT COURT JUDGE